SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 53

GEORGE D. KER, ET AL., PETITIONERS,

vs.

CALIFORNIA

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

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[fol. 1]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES.

S. C. No. 231976

D. A. No. 284830

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

v.

GEORGE D. KER and DIANE K. KER, Defendant

INFORMATION—Filed August 16, 1960

Vio. Sec. 11500, H. & S. Code 11530.

The said GEORGE D. KER and DIANE K. KER are accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of VIOLATION OF SECTION 11530, Health and Safety Code, a felony, committed as follows: That the said GEORGE D. KER and DIANE K. KER on or about the 27th of July, 1960 at and in the County of Los Angeles, State of California, did willfully, unlawfully and feloniously have in their possession a narcotic, to wit, Marijuana.

William B. McKesson, District Attorney for the County of Los Angeles, State of California, By Raymond L. Millard, Deputy. L. Raymond Millard,

[File endorsement omitted.]

[fol. 2] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

231976

[Title omitted]

Department No. WEST B

Present Hon. EDWARD R. BRAND Judge

MINUTES—August 19, 1960

Deputy District Attorney J Chandler and the Defendants with counsel, Anthony Paonessa, present. Each: Arraigned. Pleads "Not Guilty". Waives time. Set for trial on October 24, 1960, 9:00 A M in department West A. Bail.

[fol. 3] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

231976

[Title omitted]

Department No. WEST A

Present Hon. ORLANDO H. RHODES Judge

MINUTES—October 24, 1960

Deputy District Attorney R Corn and Defendants with counsel, Anthony Paonessa, present. Each: Transferred to Department West B for trial. Remains on bail.

[fol. 4] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

231976

[Title omitted]

Department No. WEST D

Present Hon. BENJAMIN LANDIS Judge

MINUTES—October 24, 1960

Cause is called for trial. Deputy District Attorney R Corn and the Defendants with counsel, Anthony Paonessa, present. By order of Court, the following jurors are impaneled and sworn to try the cause:

Mrs Jeane F Gradwohl	Mrs Flora T Leserman
Mrs Ruth H Wilkie	Mrs Mary V Lattimer
Mrs Anne Mattox	Mrs Madeline B Current
Mrs Hetty P Haeggquist	Joseph E Schultz
Mrs Mary Smith	Mrs Ora W Stair
Mrs Barbara P Sinay	Mrs Evelyn M Loether

It appearing to the Court that this may be a prolonged trial, the Court orders that an alternate juror be selected. Mrs Edith M Hendrickson is sworn as an alternate juror. It appearing to the Court that juror Mrs Barbara P Sinay is unable to be present for the remainder of the trial due to medical appointments, she is excused. The alternate juror is sworn to try the cause in place of the excused juror. Out of the presence of the jury, defendants move for a dismissal under Section 995 Penal Code and the following persons are sworn and testify therefore: Dennis A Cook, Elvis A Warthen and Leo Berman are sworn and testify for the People. Robert J Black is sworn and testifies for defendants. The motion is denied. The jury is admonished and trial is continued to October 25, 1960, 10 A M. Defendants to remain on bail.

[fol. 5] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

231976

[Title omitted]

Department No. WEST D

Present Hon. BENJAMIN LANDIS Judge

MINUTES—October 25, 1960

Trial, continued from October 25, 1960, resumes, with the Jurors present as heretofore. Deputy District Attorney R Corn and Defendants with counsel, Anthony Paonessa, present. John Wieland, Leo Berman and Elvis Warthen are sworn and testify for the People. People's Exhibits #1 (Brown manila envelope containing green leafy substance), #2 (Large manila envelope containing a shopping bag, white paper box, eye dropper and green plastic vial) and #3 (Brown manila envelope containing paper towel with seeds and cello lunch bag containing leafy substance) are admitted in evidence and filed. People rest. Defendants make opening statement. George D Ker, George R Ker, Diane K Ker, Veva Ker and Bernice Footitt are sworn and testify for the defendants. Defendants' Exhibit A (7 Photos) is admitted in evidence and filed. The Jury is admonished and trial is continued to October 26, 1960 at 10:00 A M. Each defendant remains on bail.

[fol. 6] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

231976

[Title omitted]

Department No. WEST D

Present Hon. BENJAMIN LANDIS Judge

MINUTES—October 26, 1960

Trial resumes with jurors present as before. Deputy District Attorney R Corn and the Defendant with counsel, Anthony Paonessa, present. Donald Besewick is sworn and testifies for the defendants. George D Ker is recalled and testifies for the defendants. Defendants rest. Don L. Keith and Marvin J Markman are sworn and testify for the People in rebuttal. Elvis A Warthan and Leo Berman are recalled and testify for the People in rebuttal. Both sides rest. Cause is argued. The jury is partially instructed. Jury is admonished and trial is continued to October 27, 1960, 9:45 A M. Defendants remain on bail.

[fol. 7] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

231976

[Title omitted]

Department No. WEST D

Present Hon. BENJAMIN LANDIS Judge

MINUTES—October 27, 1960

Trial, continued from October 26, 1960, resumes, with the Jurors present as heretofore. Deputy District Attorney R Corn and Defendants with counsel, Anthony Pao-

nessa, present. The Court completes instructing the Jury; the Sheriff is sworn to take charge of the Jury; and at 9:50 A.M. the Jury retires to deliberate. At 11:15 A M, the Jury returns into court with the following verdicts:

Title of Court and Cause

"We, the Jury in the above entitled action, find the Defendant Diane K Ker guilty of a violation of Section 11530 of the Health & Safety Code, a felony, as charged in the information. This 27 day of October, 1960. (Mrs) Edith M Hendrickson, Foreman"

"We, the Jury in the above entitled action, find the Defendant George D Ker guilty of a violation of Section 11530 of the Health & Safety Code, a felony, as charged in the information. This 27 day of October, 1960. (Mrs) Edith M Hendrickson, Foreman"

Polling of the Jury is waived. Re-reading of the verdicts, as recorded, is waived. The Jury is discharged. The used and unused verdicts, instructions given and refused, are filed. Defendants, personally, waive time for sentencing and ask leave to file a written application for probation. Permission is granted to each defendant. Further proceedings are set for December 9, 1960 at 9:00 A M, Department West D. Each defendant is to remain on bail.

[fol. 8] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 231976

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

DIANE K. KER, Defendant.

Dept. WE D, Santa Monica

VERDICT (GUILTY)—October 27, 1960

We, the Jury in the above entitled action, find the Defendant Diane K. Ker guilty of a violation of Section 11530 of the Health & Safety Code, a felony, as charged in the information.

This day of Oct. 27, 1960.

(Mrs.) Edith M. Hendrickson, Foreman.

Verdict (Guilty)..

[fol. 9] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 231976

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

GEORGE D. KER, Defendant.

Dept. WE D, Santa Monica

VERDICT (GUILTY)—October 27, 1960

We, the Jury in the above entitled action, find the Defendant George D. Ker guilty of a violation of Section 11530 of the Health & Safety Code, a felony, as charged in the information.

This 27 day of Oct. 1960.

(Mrs.) Edith M. Hendrickson, Foreman.

Verdict (Guilty).

[fol. 10] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

231976

[Title omitted]

Department No. WEST D

Present Hon. BENJAMIN LANDIS Judge

MINUTES—November 28, 1960

Further proceedings is advanced to this date from December 9, 1960, transferred to Department 60 and continued to December 9, 1960, 9 A M.

[fol. 11] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

231976

THE PEOPLE OF THE STATE OF CALIFORNIA,

vs.

GEORGE D KER

Department No. 60.

Present Hon. BENJAMIN LANDIS Judge

JUDGMENT—December 9, 1960

Defendant with counsel, A Paonessa, present. On motion of defendant, Al Matthews and Robert Stanley, Robert Stanley being present, are substituted as attorneys of record in place and stead of A Paonessa. Defendant's motion for continuance is denied. Defendant's motion for a new trial is denied. Bail exonerated. Notice of appeal having been filed, the Court grants a stay of execution pending appeal and sets bail on appeal at $2500. plus 5% penalty assessment. Probation denied. Sentenced as indicated.

Whereas the said defendant having been duly found guilty in this court of the crime of Violation of Section 11530, Health and Safety Code, a felony, as charged in the information.

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the State Prison for the term prescribed by law.

It is further Ordered that the defendant be remanded into the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Director of Corrections at the California State Prison at Chino.

[fol. 12] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

231976

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

DIANE K KER, Defendant.

Present Hon. BENJAMIN LANDIS Judge

Department No. 60

JUDGMENT—December 9, 1960

Defendant with counsel, A Paonessa, present. On motion of defendant, Al Matthews and Robert Stanley, Robert Stanley being present, are substituted as attorneys of record in place and stead of A Paonessa. Defendant's motion for continuance is denied. Defendant's motion for a new trial is denied. Bail exonerated. Notice of appeal having been filed, the Court grants a stay of execution pending appeal and sets bail on appeal at $1,500. plus 5% penalty assessment. Sentenced as indicated, suspended. Probation granted for five years.

☒ Spend first 6 months in County Jail.

☒ Road Camp or Honor Farm Recommended.

☒ Good time allowed if earned.

☐ Pay fine of $ through Probation Officer in such manner as such officer shall prescribe.

☐ Make restitution through Probation Officer in such amounts and manner as such officer shall prescribe.

☐ Pay any judgment arising out of this matter, when it becomes final in such amounts and manner as Probation Officer shall prescribe.

☐ Abstain from all alcoholic beverages and stay out of places where they are the chief item of sale.

☒ Not use or possess any narcotics or narcotic paraphernalia and stay away from places where addicts congregate.

☒ Not associate with known narcotic users or sellers.

☐ Have no blank checks in possession, not write any por-

tion of any checks, not have bank account upon which may draw checks.

☐ Not gamble or engage in any bookmaking activities or have paraphernalia thereof in possession, and not be present in places where gambling or bookmaking is conducted.

☐ Not associate with——

☐ Stay out of places where homosexuals congregate.

☐ Not associate with children under 14 years except in presence of responsible adults.

☒ Cooperate with Probation Officer in plan for psychiatric, psychological or other treatment.

☒ Seek and maintain employment as approved by Probation Officer.

☐ Support dependents.

☒ Maintain residence as approved by Probation Officer.

☐ Surrender drivers license to Clerk of Court to be returned to Department of Motor Vehicles, and not drive a motor vehicle for the first year after release from custody nor until lawfully licensed.

☒ Obey all laws, orders, rules and regulations of Probation Department and of the Court.

Whereas the said defendant having been duly found guilty in this court of the crime of Violation of Section 11530, Health and Safety Code, a felony, as charged in the information.

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the California Institution for Women for the term prescribed by law.

It is further Ordered that the defendant be remanded into the custody of the Sheriff of the County of Los Angeles.

[fol. 13] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 231 976

[Title omitted]

NOTICE OF APPEAL—Filed December 9, 1960

Notice Is Hereby Given that the defendants above named, George D. Ker and Diane K. Ker, hereby appeal from the judgment of the above entitled Court in Department 60 thereof, the Honorable Benjamin Landis, Judge Presiding, and from the denial of the motion for a new trial, rendered on the 9th day of December, 1960.

Notice Is Further Given to the Clerk of the above entitled Court to cause the preparation of the Clerk's transcript on appeal and to cause the preparation of the Reporter's Transcript of the oral proceedings at the trial herein.

Pending determination of this appeal, it is requested that execution of the judgment herein be stayed and that the defendants be admitted to reasonable bail.

Dated: December 9th, 1960.

Matthews and Stanley, By Robert W. Stanley.

[fol. 14] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

[Title omitted]

No. 231 976

ORDER STAYING EXECUTION AND FIXING BAIL ON APPEAL—December 9, 1960

It appearing that the defendants, George D. Ker and Diane K. Ker, have filed a Notice of Appeal from the judgment of the above entitled Court, and good cause appearing therefor,

It Is Hereby Ordered that the execution of the judgment heretofore rendered in the above entitled matter be stayed pending the determination of the appeal herein.

It Is Further Ordered that bond on appeal be set at $2,500.00, for George D. Ker, and at $1,500.00, for Diane K. Ker.

Dated: December 9, 1960.

Benjamin Landis, Judge Presiding.

[fol. 15] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 1-2] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 231,976

Department Santa Monica "D"

Hon. Benjamin Landis, Judge

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

DIANE K. KER and GEORGE D. KER, Defendants.

Reporter's Transcript on Appeal

October 24, 1960
October 25, 1960
October 26, 1960
October 27, 1960
December 9, 1960

APPEARANCES:

For the People: WILLIAM B. McKESSON, District Attorney, By: ROBERT S. CORN, Deputy, 600 Hall of Justice, Los Angeles, California.

For Defendants: ANTHONY W. PAONESSA, Esq., 513 East Manchester, Inglewood, California.

[fol. 3] Santa Monica, California, October 24, 1960, 9:30 A.M.

COLLOQUY BETWEEN COURT AND COUNSEL.

The Court: Good morning.

People versus Ker.

Mr. Corn: Ready, your Honor.

Mr. Paonessa: Ready, your Honor.

The Court: Call a jury.

(Whereupon the prospective jurors were sworn to try the cause.)

(Whereupon a jury were empaneled.)

The Court: May we have a stipulation that it won't be necessary for the Court to admonish the jury at each session?

Mr. Paonessa: Yes.

Mr. Corn: Yes.

The Court: Is it stipulated the jurors will be considered in their proper places unless called to the attention of the Court?

Mr. Corn: So stipulated.

Mr. Paonessa: So stipulated.

The Court: Will it be stipulated the defendants will be considered present, here represented by counsel, unless the Court's attention is directed they are not here?

Mr. Paonessa: Yes.

Mr. Corn: Yes.

(Whereupon the noon recess was taken at 12:00 noon.)

[fol. 4] SANTA MONICA, CALIFORNIA, OCTOBER 24, 1960, 2:00 P.M.

The Court: Ladies and gentlemen of the jury, counsel informs me that this case is going to take about four days. I understand someone here has doctor problems.

A Juror: Yes, that is me.

The Court: What is your problem?

A Juror: I have some standing appointments four days a week and I wasn't aware of the fact I would be required to spend so much time on each case.

The Court: Very well, we will select some alternate. Do you want to say something?

Mr. Paonessa: No.

The Court: All right, call the jury, and the jurors that are called, will you just sit there.

(Whereupon an alternate juror was empaneled.)

The Court: Very well, now, I understand your name is Mrs. Sinay.

The Juror: Sinay.

The Court: And you cannot serve as a juror because of the doctor's appointments?

The Juror: That is correct.

The Court: Very well, we will use the alternate. You will be excused.

You may take her place.

[fol. 5] (Whereupon the alternate juror is sworn.)

The Court: Very well, ladies and gentlemen, I have some good news for you. You will have another recess. We have some legal problems to discuss so you will please return to your jury room.

(Whereupon the jury returns to the jury room.)

The Court: All right, let us proceed.

Mr. Corn: If it please the Court, I don't believe the motion has been made on direct examination by counsel.

Mr. Paonessa: Yes, well, for the purpose of the record then, I move that the probable cause hearing be conducted outside of the presence of the jury.

The Court: Very well, the jury is not here, we will do that.

Mr. Corn: I understand the Court wants me to put Officer——

The Court: I cannot hear you.

Mr. Corn: The Court wishes I place my officers on the stand to show there was probable cause.

The Court: Correct.

(Evidence concerning probable cause.)

Mr. Corn: Sergeant Cook.

[fol. 6] DENNIS A. COOK, called as a witness on behalf of the People, having been duly sworn, was examined and testified as follows:

The Clerk: Be seated, please. State your full name.

The Witness: Dennis A. Cook.

Direct examination.

By Mr. Corn:

Q. Sergeant Cook, is it not?

A. Yes, it is.

Q. And you are a Los Angeles County Deputy Sheriff attached to the Narcotics Detail?

A. Yes, sir, that's correct.

Q. Now, were you employed as a Deputy Sheriff attached to that Detail on the 25th and 26th of July of 1960?

A. Yes, sir, I was.

Q. And did you have any narcotic transaction with any individuals on the 25th of July——

A. Yes, sir, I did.

Q. —1960? Will you please tell the Court what happened?

A. Yes, sir, on the 25th day of July this year at approximately 8:25 p.m., I purchased approximately 17 milligrains of heroin from a Mr. William Terrhagen.

[fol. 7] Q. That was purchased with the County funds?

A. Yes, sir, that's correct.

Q. Pursuant to a narcotics investigation?

A. That is correct.

Q. Will you please tell the Court how this purchase occurred?

A. Yes, sir. On that date I was introduced to Mr. Terrhagen by a confidential informant. I spoke with him, made arrangements to purchase one pound of marijuana. Those arrangements were made at Mr. Terrhagen's home, 14832 South Normandie Avenue.

The Court: What is the name, Terrhagen? Spell that.

The Witness: T-e—I believe it is double r—h-a-g-e-n.

The Court: Go on.

The Witness: And he at that time directed myself and this informant to go to Lou's Barbeque, which is on Rose-

crans Avenue in Gardena, I'd say approximately a hundred yards west of Normandie. We went and waited in the parking area at that location and at approximately 8:20 p.m. Terrhagen arrived. I talked to him. He told me that he couldn't get a hold of the connection at that time but he could get the Marijuana for me later. I then had a conversation with him about Heroin. He said, yes, he could [fol. 8] give me some right then and produced a package from his trouser pocket. We then talked about quality and I told him to give me a couple of caps' worth because it was loose in a piece of tinfoil. He then seated himself in his vehicle, took a small pocket knife out and dug out a small portion of Heroin which was in a powder state, put it in another package and handed it to me and I gave him $6.00 which is what he requested.

By Mr. Corn:

Q. Well, now, did you purchase any other narcotics from Terrhagen or receive any narcotics other than——

A. Yes, sir, on the following day.

Q. Oh, on the following day?

A. Yes.

Q. Will you tell the Court under what circumstances you received those narcotics?

A. Yes, I called Mr. Terrhagen at his home. I called him from the location of Rosecrans and Western Avenues approximately 7:00 p.m. on the following day which was the 26th day of July, this year. I requested at that time that I wanted the pound of Marijuana we had discussed the previous day. He stated for me to wait where I was after I told him that I was at Rosecrans and Western Avenues in Gardena, and he would be right by to pick me up. At this time he came by. I got in his vehicle with him. He then proceeded to the Tropicana Bowling [fol. 9] Lanes, which is, I believe, at 11163 South Prairie Avenue in Inglewood or Lennox areas. At this location he pulled in and parked on the parking area, stated he was to meet his connection in the bowling alley and for me to wait for him. He entered the bowling alley through the restaurant portion and then returned, oh, I guess in about five minutes. He started up his car and as he was starting the car he told me he had talked to his connection. The

connection was waiting for another man that wanted some Marijuana, that he was supposed to meet at this location, and would meet us shortly up by the oil fields by Fairfax and Slauson Avenues. As he started to pull out he pointed to a 1946 De Soto parked two cars east in the parking area, stated that was the connection.

Q. The '46 De Soto was the connection's car, is that what he said?

A. Yes, sir.

Q. And——

A. And made some remarks about a pet bull dog, calling to the dog—calling the name of Abel, telling me that was the dog's name, about the fact it was a fighting dog. As we pulled around in front of this 1946 De Soto I obtained the license number of it, which was JPU-016.

Q. JPU-016?

A. Yes, that's correct.

[fol. 10] Q. This is the 1946 De Soto?

A. Yes, sir.

Q. Did you see the person in the De Soto?

A. There was no one but the dog seated in the car at that time.

Q. What happened then?

A. At that time we went northbound on Prairie, Mr. Terrhagen continued talking about the dog and the fighting of pit bulls. We stopped for gas in a gas station, took us above five minutes, then he proceeded up to Fairfax and there northbound on Fairfax Avenue I'd say approximately 200 yards south of Slauson Avenue, approaching the intersection of Slauson and Fairfax, when I observed this 1946 De Soto that I had seen at the bowling alleys. It was westbound on Slauson and made a turn going northbound on Fairfax ahead of us.

Q. Did you arrange—did you meet this De Soto and stop?

A. Yes, subsequent to that, approximately, oh, I'd say ten minutes later or so, Mr. Terrhagen crossed Slauson and parked, I'd say, less than a quarter mile north of Slauson and Fairfax by some vacant fields and he stated that that was the connection that had turned north on Fairfax, and that he had his supply of narcotics somewhere up in the hills, that he would return and as we were wait-

[fol. 11] ing there, he asked me for the money we had pre-

viously agreed on, a price of $70.00 for one pound of Marijuana. I gave him the money and it was shortly after 8:00 that I observed this 1946 De Soto returning, going southbound on Fairfax. It pulled just past our position, made a U-turn, pulled right up alongside Mr. Terrhagen's car in which Mr. Terrhagen and I were seated, and at this time I observed the driver to be Roland Murphy.

Q. Do you know Roland Murphy?

A. I observed him by mug photographs—I observed on several occasions.

Q. What do you know of Roland Murphy, to your own knowledge, if anything?

A. By information from other members of the Detail I worked on.

Q. What information did you you have with reference to Roland Murphy?

A. That he was engaged in the large scale selling of Marijuana, and that at that time he was out on bail for two other Marijuana cases.

Q. What did Terrhagen and Murphy do at that time, if anything?

A. At that time Mr. Terrhagen had taken the money, the $70.00, from me. He got out of his vehicle and got into the 1946 De Soto with Mr. Murphy and this pit bull dog. They drove again northbound on Fairfax up over [fol. 12] the hill out of my sight, into the oil fields. Then, approximately, oh, I'd say about 10 to 15 minutes later, they returned again, coming southbound on Fairfax. They pulled past my location, made a U-turn and pulled up alongside of Mr. Terrhagen's car in which I was still seated. At that time Mr. Terrhagen got out of Mr. Murphy's car with a kilo flat brick-type package of Marijuana and entered his vehicle. At that time Mr. Murphy drove northbound on Fairfax up toward the oil fields again, out of my sight. We made a U-turn and returned to Mr. Terrhagen's, 14832 South Normandie.

Q. Did you receive this kilo of Marijuana?

A. A portion of it. We went in Mr. Terrhagen's home where he——

Q. Did he make a sale of Marijuana?

A. Yes, sir, he cut out one pound, weighed it and gave me a one-pound portion of it.

Q. Now, you have been on the Narcotics Squad for how long, Officer?

A. Nine years.

Q. Do you know what Marijuana is?

A. Yes, sir.

Q. Was that Marijuana?

A. Yes, sir, it was.

Q. Now, did you convey this information to your brother officers?

A. Yes, I did.

[fol. 13] Q. Which brother officers?

A. Well, to Sergeant Warthen.

Q. Warden?

A. Warthen.

Q. Is that Sergeant Warthen then seated over there in the first row inside the——

A. In the light colored suit, yes, sir.

Q. Who else?

A. Deputy Berman, who is seated at the counsel table, and Deputy White.

Q. Other officers also?

A. Yes, sir.

Q. On what date did you relay this information to Warthen?

A. It was on the date that I made the purchase, on the 26th of July, this year.

Q. You gave him all of the information that you have related to us?

A. Yes, sir.

Mr. Corn: I have no further questions.

Cross-examination.

By Mr. Paonessa:

Q. Officer Cook, when this Mr. Terrhagen led you to Roland Bush and you saw Roland Bush sell him this quantity of Marijuana and these various events that you tes-

[fol. 14] tified to, did you make any move toward arresting Mr. Bush at that time?

A. I am sorry, sir, Mr. Murphy—Roland Murphy.

Q. Mr. Murphy at that time, excuse me.

A. No, sir, I did not at that time.

Q. You didn't make any effort to arrest him at that time.

Did you make any sort of arrangement with him whereby you'd go easy on him and wouldn't arrest him if he'd agree to lead you to some other people who were involved with narcotics?

A. No, sir, I never even had the opportunity of speaking with Mr. Murphy at this point. Closest I had gotten to him when he pulled alongside of Mr. Terrhagen's, and Mr. Terrhagen jumped out and got in with him, then they drove off and returned, and then the same thing happened in reverse.

Mr. Paonessa: I have no further questions of this witness.

The Court: Let us proceed.

Mr. Corn: Elvis Warthen.

Elvis A. Warthen, called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

[fol. 15] The Clerk: Be seated, please. State your full name for the record.

The Witness: Elvis A. Warthen.

The Clerk: Spell your last name, please.

The Witness: W-a-r-t-h-e-n.

Direct examination.

By Mr. Corn:

Q. Now, you also are a Deputy Sheriff of the Los Angeles County attached to the Narcotics Detail?

A. That's correct.

Q. And you were so employed as such on the 25th, 26th, 27th of July of 1960?

A. Yes, sir.

Q. And you have been so employed up to date from those dates, is that correct?

A. Yes, sir.

Q. Did you receive any information from the preceding witness concerning a Roland-Murphy?

A. Yes, sir.

Q. Received information concerning a license number and a car, also, is that correct?

A. I received information concerning it; also I had observed it having been a surveilling officer during all the occasions Sergeant Cook previously related to.

[fol. 16] Q. You observed the occurrence that he just testified to?

A. Yes, sir, I observed the occurrence and I had conversation with him about it after the occurrence.

Q. And did you observe Roland Murphy on any other dates—well, I withdraw that question.

Did you observe him on the 27th of July of 1960?

A. Yes, sir, I did.

Q. Will you please tell us the circumstances under which you observed him then?

A. I first observed him at his home as he was coming out of the house, believe that is 1246 West 139 Street in the City of Gardena. I saw, with Deputy Markman, followed him to the Tropicana Bowling Alley, where he entered. Was inside for, as I recall, approximately 10 minutes. He returned, got back in his automobile, a gray 1946 De Soto, JPU-016. He went north on—on Prairie Avenue from Tropicana Bowling to 102nd Street and west on 102nd. He stopped at a house just before he got to Hawthorne Boulevard. He entered the house, was inside a few minutes, and then proceeded on west to Hawthorne Boulevard and north on Hawthorne Boulevard where I lost sight of his vehicle. I then proceeded to Slauson and Fairfax and north on Fairfax to the top of a hill where Deputy Markman and myself remained in my vehicle until we later observed Roland Murphy drive past us in the [fol. 17] '46 De Soto and into the oil fields.

Q. And what did you observe happen in the oil fields, if anything?

A. I didn't observe anything happen in the oil fields. I observed him drive into the oil fields and prior to his driving into the oil fields, I had observed Mr. Ker seated in his automobile in approximately the same location that I

observed Mr. Terrhagen and Sergeant Cook previously meet with Mr. Roland Murphy.

Q. Mr. Ker in the car?

A. Mr. Ker was in the vehicle at the time I first observed it prior to Roland Murphy's entering the oil fields and when Mr. Murphy returned from the oil fields he stopped immediately behind the vehicle Mr. Ker was seated in. He walked up to the driver's side of the vehicle Mr. Ker was seated in and appeared to have conversation with him. Mr. Ker immediately then drove away, driving south on Slauson and east on Slauson to La Brea, north on La Brea approximately a block. I followed him that distance and he made a U-turn in the middle of the intersection—correction, in the middle of the street between intersections, going north on La Brea and headed back south on La Brea and I lost him right at that time.

Q. Did you take the license number of the vehicle that Mr. Ker was in?

A. Yes, sir, I did.

[fol. 18] Q. Did you make a registration check of that license number?

A. Yes, sir.

Q. And did you—what did you discover?

A. The license was registered to a Douglas Ker at the address 4801 Slauson.

Q. Did you communicate this information that you have just testified about to Deputy Sheriff Berman?

A. I am sorry?

Q. Did you communicate this information to one Deputy Joe Berman?

A. When did I do that?

Q. Yes.

A. It was in the evening, probably 15 to 30 minutes after I had seen the meeting between Mr. Ker and Mr. Murphy.

Q. On the 27th?

A. On the 27th day of July, yes, sir.

Mr. Corn: I have nothing further.

Cross-examination.

By Mr. Paonessa:

Q. Well, now, on this evening of the 27th when you were following this Roland Murphy, he was aware that you were following him, was he not?

[fol. 19] A. No, sir, he was not—correction, I don't believe he was.

Q. Isn't it true that either you or Deputy Markman made some deal with him, some arrangement whereby he promised to lead you to some other people that you could arrest for narcotics in exchange for not arresting him?

A. No, sir.

Q. Isn't it true that you actually did arrest this Murphy, you or Markman or one of the other officers arrested Murphy about the 30th of July, isn't that true?

A. I don't know the exact date, but it was approximately that time I participated in an arrest of Roland Murphy, yes, sir.

Q. And isn't it true that there were no charges filed against him as a result of that arrest?

Mr. Corn: That is all immaterial, your Honor, I myself am not aware of anything with reference to Roland Murphy.

The Court: You may answer the question I don't think it makes much difference. You may answer.

The Witness: Would you repeat the question?

Mr. Paonessa: Q. Isn't it true that there were no charges filed against Mr. Murphy as a result of that arrest on or about the 30th of July?

A. That is not true, no sir.

Q. Isn't it true that his bail was exonerated and there were no—nothing was filed against him?

[fol. 20] A. It's my opinion that a Complaint has been filed and it is—the case is still pending. I did not personally file the case, however.

Q. You didn't file any charges against him yourself, though?

A. No, sir.

Q. Now, prior to the time you claim you saw Mr. Ker

at the intersection, well, near Slauson and Fairfax, you had never seen him before, had you?

A. No, sir, as far as I know I had never seen him before.

Q. And when you saw him on that occasion you didn't recognize him at all, did you?

A. No, sir, I did not.

Q. What was the license number of the car you saw on that occasion you claim Mr. Ker was riding in?

A. At this time I don't recall, sir.

Q. What kind of a car was it?

A. It was a club coupe—Chrysler product—about a '46, I believe it was a Dodge, possibly De Soto.

Q. Do you recall how Mr. Ker was dressed on that occasion?

A. No, sir, I do not.

Q. What color was the car?

A. Gray or tan. I am not sure of the exact color.

[fol. 21] Q. Did you make a note of the license number?

A. Yes, sir, I did.

Q. Is that available to you now?

A. I believe it's possibly in the notebook I have in my pocket. I am not sure.

Q. Would you look and see if the license number is there?

A. No, sir, I don't appear to have it in this notebook.

Q. It's true that you never had that license number, isn't it?

A. No, sir, it is not. I wrote down the license number. I ran the license number to determine who owned the vehicle.

Q. The truth is that you actually found Mr. Ker's address through another person, another person informed you of that address, isn't it——

Mr. Corn: Objection, argumentative.

The Court: He can answer if it is true or isn't true.

The Witness: I first observed the address together with the identity of the person through the Department of Motor Vehicles, and later also had the address confirmed through another person.

By Mr. Paonessa:

Q. Isn't it true that this Roland Murphy was the first [fol. 22] one who told you of Doug Ker and his address?

A. No, sir.

Q. Now, you say you participated in an arrest of Roland Murphy with some other officers on or about the 30th of July of this year. Who were those other officers?

A. I believe Officer Goodwin, John White. There were other officers there at the time. I don't recall for sure who was at the immediate location.

Q. Officer Goodwin and Officer White are the only ones you recall now?

A. I know they were on the immediate scene. There were several other officers. Officer Berman and Officer Cook, I know, were in the immediate vicinity. I don't believe they were at the location at the time of the arrest, however, as I recall.

Q. Is Officer Goodwin and Officer White present in Court today?

A. No, they are not.

Q. When you ran a check on Mr. Ker's car, what was the full name that it was in the register?

A. I don't know for sure, sir.

Q. Didn't you make any notes of that, to whom it was registered?

A. I don't find my notes regarding any of that. I evidently don't have them with me at this time.

Q. Now, when you saw Mr. Murphy meet this car, you [fol. 23] claim Mr. Ker was in, did you see anyone else in the car that you say Mr. Ker was in?

A. No, sir, I did not.

Q. Did you see anything pass between Mr. Murphy and Mr. Ker at that time?

A. No, sir.

Q. Did you hear any of the conversation between the two?

A. No, sir.

Q. Approximately how far were you away from the car of Mr. Ker at that time?

A. I was approximately a thousand feet away at the time that Mr. Murphy pulled up behind the car. I drove past the car, past the two vehicles to Slauson where I made

a U-turn and pulled into a parking lot to continue observing. Again, I was approximately a thousand feet away on the other side.

Q. And what time of night was it that this took place when you observed Mr. Ker, Mr. Murphy approach this car you claim Mr. Ker was in?

A. As I recall, it was about 8:00 o'clock.

Q. Was the place well-lighted, or was it pretty dark?

A. At this time I don't recall whether it was daylight or well-lit. I was able to see quite well, that I do recall. [fol. 24] Q. And did you actually see—I mean, I withdraw that, excuse me.

Did you actually recognize the person who was in the car that Mr. Murphy approached as the defendant sitting with me at the counsel table, Mr. Douglas Ker? Did you actually recognize that person at that time?

A. I didn't know Mr. Ker at that time. I observed him well enough to where I could identify him as the person seated next to you now.

By Mr. Paonessa:

Q. I have no further questions of this witness.

The Court: Let us proceed. Step down.

Mr. Corn: No further questions.

Leo Berman, called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please. State your full name.

The Witness: Leo Berman.

The Clerk: Spell your last name, please.

The Witness: B-e-r-m-a-n.

[fol. 25] Direct examination.

By Mr. Corn:

Q. You are a Deputy Sheriff of Los Angeles County attached to the Narcotics Detail?

A. I am.

Q. And you are one of the arresting officers in this case?

A. I am.

Q. Do you know whether or not any Complaint has been filed against Roland Murphy, the person referred to in the preceding testimony.

A. There has been.

Q. Where?

A. In the United States Federal Court on three counts as conspiracy to violate the Federal Narcotics Laws.

Q. When was that—that was—that information—strike that.

Do you know when that Complaint was filed?

A. After his arrest on or about the 30th of July.

Q. Now, Mr.—Sergeant—or Deputy?

A. Deputy.

Q. Deputy Berman, you received information from Sergeant Cook and Deputy Warthen concerning Mr. Ker, did you not?

A. I did.

[fol. 26] Q. And was that the information that they referred to in their testimony on the stand?

A. That is correct.

Q. And you received this information on what date?

A. On the date of the arrest, July 27th or—Sergeant Cook's on July 26th and Sergeant Warthen's on July 27, 1960.

Q. And this—you say the information from one of them was on the date of the arrest?

A. That is correct.

Q. And the date of the arrest was on when?

A. The 27th of July, 1960.

Q. This information was received prior to the arrest?

A. That is correct.

Q. Now, and you know Mr. Ker before receiving this information or know of Mr. Ker before receiving this information from either of your two brother officers?

A. I did.

Q. Did you hear about him from anyone else?

A. I did.

Q. Did you hear about him from an informant?

A. I did.

Q. What did you hear about him and when?

[fol. 27] A. My first information pertaining to the defendant Ker was in November of 1959. I received information from various persons, bits of information in regard that he was selling Marijuana from his residence, and that he was possibly securing this Marijuana from Ronnie Murphy who is the alias of Roland Murphy.

Q. That is the same person referred to by the preceding officers?

A. That is correct.

Q. Continue.

A. I subsequently in the early part of 1960 received a mug picture of the defendant, George Ker, from the Inglewood Police Department, and received various bits of information until May, 1960, and between May and July 27 of 1960 I had received information from one Robert J. Black in regard to the activities and trafficking of Marijuana by the defendant, George Ker.

Q. Robert Black?

A. That is correct.

Q. Did Robert Black give you any other information?

A. He had previously, yes, sir.

Q. You have used him in other cases?

A. I used his information in other cases, yes, sir.

Q. Used his information. Is there a distinction between the word "using him" and "using his information"?

[fol. 28] A. Yes, in our work to "use a person" would be to physically use him.

Q. I see. How many times did you use the information of Robert Black before you received information concerning Ker?

A. Prior to the arrest at least three occasions.

Q. And what did this information result in, if anything?

A. In the arrest of two persons on the forgery of checks, one person on a narcotics charge and information pertaining to Mr. Murphy's activities which aided us in the investigation on Mr. Murphy.

Q. Did you have any feeling about the reliability of this Mr. Black?

A. I did not.

Q. Did you have any feeling about the reliability of Mr. Black as an informant?

A. I believed his information was reliable.

Q. Now, pursuant to this information, did you then go to Mr. Ker's apartment?

A. That is correct.

Q. Where was that located?

A. At 41 or—correction—4801 West Slauson Avenue, Apartment 29, Los Angeles.

Q. Tell us the circumstances of the arrest?

[fol. 29] A. We first received a—ascertained that the parties were home, both defendants were home. We then went to the manager of the apartment, identified ourselves, received a key to the apartment, unlocked the door of the apartment. As we entered the apartment, that was myself, Deputy Warthen and Deputy Love, I observed defendant George Ker to be seated on the couch. He stood up immediately. When I identified ourselves as Sheriffs' Narcotics Officers and advised George Ker that we were conducting a narcotics investigation, at which time the defendant, Diane Ker, came from the kitchen of the apartment and I advised her of our identification, identified ourselves and advised her that we were conducting a narcotics investigation.

I then proceeded to the kitchen where Mrs. Ker had just left, which Mrs. Ker had just left, and I observed a brown package that had a small tear in it, a square package, upon a small scale on the sink in the kitchen. This package contained a green, leafy substance which resembled Marijuana and weighed approximately two and two-tenths pounds.

Q. Did you know how many cigarettes——

A. Yes, sir.

Q. You have been on the force how long?

A. Three years.

Q. About how many cigarettes could be prepared from two and—how many tenths?

[fol. 30] A. Two and two-tenths pounds. Depending on how it would be rolled, get 40 to 60 cigarettes from ap-

proximately an ounce, so it would be—I'd have to do it with pencil and paper. I believe the Court can draw the proper inferences.

The Court: Let us proceed.

By Mr. Corn:

Q. What happened then?

A. I then advised them that—the defendants that they were under arrest. I asked—I brought them back into the kitchen, showed them the kilo brick, what appeared to be Marijuana. I asked both defendants if it was theirs, and both defendants stated that it was not theirs. I asked defendants——

Mr. Paonessa: Your Honor, aren't we going a little beyond reasonable cause?

The Court: Yes, I think we are. All right.

Mr. Coin: I believe—I submit, your Honor, that from the testimony probable cause has been shown.

The Court: All right. Proceed.

Cross-examination.

By Mr. Paonessa:

Q. Officer Berman, you participated in the arrest of Roland Murphy on July 30, is that not true?

A. That is correct.

Q. And you know of your own knowledge there was no [fol. 31] Complaint filed as a result of that arrest, isn't that true?

A. The Complaint is on file with the U.S.——

Q. But that was as a result of another arrest, was it not?

A. No, it was on the conspiracy charge.

Q. But, as far as anything you had against Mr. Murphy, there was nothing filed at that time, isn't that true?

A. I don't understand your question.

Q. As far as any charges, you didn't press—you yourself didn't press any charges against Roland Murphy as a result of that arrest, did you?

Mr. Corn: If the Court please, this question is unclear because——

The Court: It's unclear and I just don't understand what you are—how is that pertinent to this inquiry of probable cause?

Mr. Paonessa: I am trying to show there was some cooperation between Roland Murphy and these officers, and that Roland Murphy was providing them with certain information, false information, in an attempt to try and save himself.

The Court: Where does the false information come in, when this officer went into these people's home and saw the Marijuana? What is false about that?

[fol. 32] Mr. Paonessa: Well, the fact that he led them to this place on Slauson and La Brea and perhaps cooperated with the police to the extent that even entrapping these defendants.

The Court: Well that theory, you feel, is no probable cause?

Mr. Paonessa: My theory is there is a dispute as to the facts. I intend to dispute the facts of the probable cause.

The Court: Proceed. What is the question that is pending now?

Mr. Paonessa: I merely asked the officer if, as a result of the arrest of Mr. Roland Murphy on or about the 30th of July, 1960, there were any charges filed against Mr. Murphy in the California Courts.

The Court: He testified as far as he knows that is not so, the Federal Courts, is that correct?

The Witness: That is what we filed the case in conjunction with the Federal Bureau of Narcotic Enforcement.

The Court: All right.

By Mr. Paonessa:

Q. Now, you testified that one of your informants in regard to this matter was one Robert J. Black?

A. That is correct.

Q. Just what did he tell you in regard to Mr. Murphy? [fol. 33] What was his statement?

A. In regard to Mr. Murphy, that he had purchased quantities of Marijuana from Mr. Murphy, that Mr. Ker had purchased quantities of Marijuana from Mr. Murphy and other persons had purchased quantities of Marijuana from Mr. Murphy.

Q. And when, approximately, did you last have a conversation with Mr. Black?

A. The exact date I do not recall. I had several conversations with Mr. Murphy.

Mr. Corn: He is answering a non-responsive question, it's Mr. Black.

The Witness: Correct, with Mr. Black. After, I believe, May of 1960, possibly four or five conversations in which the defendant's name had come up and Mr. Murphy's name had come up.

By Mr. Paonessa:

Q. These conversations were with Mr. Black?

A. That is correct.

Q. Who else participated in these conversations?

A. Believe Deputy Joel Lesnick. That is the only officer I can recall other than myself.

Q. What other person other than Mr. Black gave you information as to Mr. Ker's activity, not connected with the Sheriff's Department or——

Mr. Corn: if the Court please, I don't wish to make an [fol. 34] objection at this time or suggest anything to the officer, but I belive the Court should take cognizance of the fact the officer is entitled to refusing to disclose this under 1881.5 CCP upon laying proper foundation.

The Court: Yes, I think so.

By Mr. Paonessa:

Q. Well, Officer Berman, are you aware that I have Mr. Black in jail to testify today and that he is prepared to testify that he never gave you any such information?

Mr. Corn: If the Court please, this is an improper argumentative type of question.

The Court: Sustained.

By Mr. Paonessa:

Q. Does the name Krug ring a bell with you?

A. I do know several Krugs.

Q. Dwayne Krug, do you know a person by the name of Dwayne Krug?

A. I do.

Q. Did he ever provide you with any information?

Mr. Corn: If the Court please——

The Court: Sustained.

Mr. Corn: I make an objection——

The Court: This is on probable cause. I don't know why it is even pertinent.

[fol. 35] Mr. Corn: Again, your Honor, I wish to state that—may I ask the officer some questions on voir dire with reference to 18——

The Court: Yes.

Voir Dire examination

By Mr. Corn:

Q. Have you received information from other informants?

A. I have.

Q. Do you believe that in your knowledge that the liberty, life and welfare of these informants would be endangered?

A. I do.

Q. Do you believe the interests of the State of California would be best protected by the non-disclosure of these names?

A. I do.

Q. Then, do you wish to invoke the People's privilege under 1881.5 of CCP at this time——

A. I do.

Q. —with reference to these other names?

A. I do.

Q. I submit any interrogation with reference to names at this time other than the individuals already in evidence [fol. 36] in an attempt a side door excursion to uncover the informants would be improper.

The Court: Very well. Let us proceed.

Mr. Paonessa: I have no—I would just like to make the statement to the Court that the defense in this action is in the nature that some person, unknown to these defend

ants, planted these things in their apartment, and therefore it is very important that I know the persons who informed on Mr. and Mrs. Ker, in other words, to properly present their defense.

The Court: Well, I think the law is very well established that the witness has a perfect right to not disclose his informants.

Mr. Paonessa: According to the Priestly case, I am entitled to disclosure of the informants and he has disclosed one informant to me who I have examined, and he turns out he denies that he was ever such an informant. Now, I want to know who else these other—what other informants provided this officer with information so I can go into the possibility that they were the ones that framed these defendants.

The Court: In other words, your theory is these informants took this Marijuana found in the apartment, and planted in there?

Mr. Paonessa: Yes, your Honor.

The Court: I think it is a little far-fetched. That is for [fol. 37] the jury to decide, not me. Do you have any comment?

Mr. Corn: Yes, if your Honor wishes comment with reference to this, I'd be happy to state it.

The Court: Yes.

Mr. Corn: The situation, as I understand it, counsel has indicated to the Court that Mr. Black is going to deny that this information was ever given to this officer. This is a matter of credibility of the witnesses which the Court, of course, can determine. The basic purpose of this entire pre-jury hearing is to determine whether or not this officer had in his mind a reasonable suspicion to believe, one, a crime has been committed, and two, these defendants committed this crime. He has testified Mr. Black gave him this information. I submit to the Court notwithstanding Mr. Black's information that the highly involved circumstances, all chain of evidence, concerning the sale of Marijuana in the oil fields or near the oil fields might in and of itself be sufficient, but it is a borderline situation and these officers, not wishing to—having been burdened before with reference to decisions which are contrary to what they have done, which—it to be absolutely sure they

got additional informant and this, together with the other information, I submit to the Court, leaves no room for any doubt as to a reasonable probable suspicion being in the officer's mind.

[fol. 38] The Court: Well, I think this inquiry, as far as probable cause, has gone long enough. I think I am ready to make my ruling. Do your have any—I am sustaining a motion of Mr. Corn as far as asking him any further questions in connection with the informants.

Mr. Paonessa: I'd want to call Mr. Black to the stand to have his testimony in regard to having never had knowledge or informed on either of these defendants, and have the Court's ruling on——

The Court: Let us assume Mr. Black does testify to that. I don't think it would affect any determination as to probable cause in view of the testimony adduced here so far, and I think it would be—use Mr. Black—might as well save him for the trial.

Mr. Paonessa: Well, I merely was contending, your Honor, that if Mr. Black—if it's proven that Mr. Black's testimony is creditable enough to show he was not the informant in this case, that I should be provided with at least one other name.

The Court: Mr. Corn?

Mr. Corn: I have no objection to Mr. Black going on the stand at this time, your Honor. If I might submit to the Court, it might, in fact, be proper to do so to protect the record.

The Court: Very well. I think as far as this witness is concerned, you are finished with him?

[fol. 39] Mr. Paonessa: Yes, I have no further questions.

The Court: All right, you may step down.

Mr. Corn: Thank you, your Honor. We rest with reference to the probable cause issue.

The Court: All right.

Do you want to call Mr. Black?

Mr. Paonessa: Yes, I will call Mr. Black.

The Court: Where is Mr. Black?

Mr. Paonessa: He is——

Mr. Corn: In custody, I understand, your Honor.

The Court: All right.

I was just wondering if we should excuse the jury. It is 3:30 now.

Mr. Corn: It might be judicious.

The Court: You might sit down, Mr. Black.

ROBERT J. BLACK, called as a witness on behalf of the defendants herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please.

The Court: Sit down, Mr. Black. Please call the jury out and I will excuse them.

(Whereupon the jury returns to the courtroom at 3:25 p.m.)

The Court: Members of the jury, the Court has [fol. 40] some additional business which is going to take some time and I thought it would be advisable to have you excused instead of waiting. You are now excused until 10:00 o'clock tomorrow morning. Remember my admonition about not discussing this case with anyone, and you are instructed not to remain in the courtroom. When you leave you are to leave the courtroom and the building. Thank you very much. 10:00 o'clock tomorrow morning.

(Whereupon the jury leaves the courtroom.)

The Court: We will take a five minute recess.

(Whereupon a five minute recess was taken.)

The Court: Proceed.

The Clerk: State your full name for the record.

The Witness: Robert J. Black.

Mr. Paonessa: Your Honor, I would like to address one or two questions to Mr. Black for his own protection because there were some statements made to him, and I don't think he should be prejudiced by the fact that he came down or testified in Court here today.

Mr. Corn: Will the Court Reporter repeat that last to me?

(Whereupon the Reporter reads the last remarks of Mr. Paonessa.)

Mr. Corn: I don't understand that.

Mr. Paonessa: Well, there were some statements made to him in the nature that he would suffer or he [fol. 41] might possibly suffer certain penalties for testifying here in Court today, and I just want to ask him who made these statements to him and what the statements were.

The Court: Ask him. Go ahead.

Direct examination

By Mr. Paonessa:

Q. Mr. Black, did anybody make any statements to you in the nature that you'd suffer any penalty by coming down here and testifying in Court today on behalf of Mr. Ker?

A. As far as what I would say—I mean, I understood them because the officer told me that he had talked to Mr. Berman during the weekend and I says, really, what did he have to—said just that, "You weren't going to make it". Maybe two weeks later the same officer told me, he says, "Well, you realize you are in a cross. If you don't testify for Doug he may shoot you down, and if you don't testify for the State, they are bound to shoot you down". That is as close as I can remember it worded to me.

Q. Did he explain to you what he meant by "the State shooting you down"?

A. Just that I was in a bad position.

Q. And who was this that made these statements?

[fol. 42] A. His name is Magillery.

Q. Are you acquainted with Mr. Doug Ker and the wife, Diane Ker?

A. Yes.

Q. And of your own knowledge, do you know of anything connecting them with the narcotics traffic?

A. No.

Q. Did you ever hear anybody say anything connecting them with the narcotics traffic?

A. Not that I can remember, no.

Q. Did you ever make any statements to Officer Berman or any other police officers or any other persons, for that matter, accusing either Douglas Ker and Diane Ker of being connected with narcotics and the narcotics traffic?

A. No.

Q. Now, Officer Berman just before testified under oath—just before you, and claims that you did make certain statements to him to the effect that Doug Ker was connected with narcotics. Are you prepared to deny that?

Mr. Corn: If the Court please, I don't—I am not going to be technical in any of my objections, let's keep within the bounds of reasonableness, reframe from—too leading a question.

The Court: He may answer the question.

[fol. 43] By Mr. Paonessa:

Q. Are you prepared to deny that, realizing that you are under oath too today?

A. I look at it exactly the way he did under oath, and, no, I did not give him any information.

Q. About how long have you been acquainted with Doug Ker?

A. Maybe four, four and a half years, something like that.

Q. And during this time you knew several of his acquaintances?

A. I know his cousin, and sometimes we used to go to the beach and things like that.

Q. And you never heard any of them say anything about Doug Ker in connection with narcotics?

A. No.

Mr. Paonessa: I have no further questions, your Honor.

The Court: Do you have any questions?

Mr. Corn: Yes, your Honor.

Cross-examination.

By Mr. Corn:

Q. That Magillery, he is a Deputy Sheriff or just a—strike that.

What type of police officer is Magillery?

A. He is an officer at Mira Loma.

[fol. 44] Q. Up at Mira Loma?

And he is attached to the Correctional Facility at Mira Loma?

A. He is a guard, yes.

Q. He is a guard there?

A. I believe so.

Q. Is he your guard, or do you know his first name or his number or anything by which he could be described?

A. I don't have any personal guard but I see him there quite often.

Q. Is he one of the individuals who stay at Mira Loma all of the time?

A. I believe that he lives in one of the apartments that is built there for the officers.

Q. In other words, he has a family up there at Mira Loma?

A. He is single.

Q. And exactly what did he say to you, sir?

A. At which time?

Q. He spoke to you several times?

A. Once every other day.

Q. About this occurrence here?

A. Each time we talked it was involving narcotics.

Q. Forgetting M. Magillery for the moment, sir, you [fol. 45] say you never spoke to Mr. Berman about Mr. Ker?

A. No.

Q. You never mentioned Mr. Ker's name at all?

A. The name was never mentioned.

Q. Do you remember being at the Carolina Pines Bowling Alley when Mr. Berman was there?

A. Carolina Pines?

Q. Yes.

A. If he was there and I was there, I didn't see him.

Q. Did you ever speak to Mr. Berman at the Carolina Pines Bowling Alley?

A. No.

Q. Did you ever see an officer, Deputy Sheriff Lesnick at the Carolina Pines Bowling Alley?

A. Just a minute, the Carolina Pines is the one on Century by the Airport?

Q. Excuse me, your Honor.

Apparently so.

A. Yes, on this particular night I was at my house and the two officers, Mr. Lesnick and Mr. Berman, came over and asked me if I would like to go with them and have a cup of coffee. At this time they bought me a cup of hot chocolate and asked me what I could——

Q. What did you have, hot chocolate?

A. Yes. I didn't remember the name of the——

[fol. 46] Q. At that time, did you not speak to them concerning the Ker's?

A. No.

Q. Did you speak to Joe Berman, the Deputy Sheriff, down at Lennox Station?

A. Joe Berman and I don't talk to each other.

Q. Had you ever spoken to him about anything?

A. He has talked to me.

Q. You are angry at him?

A. I don't care for him.

The Court: That is unimportant, whether he is angry at him or not.

Mr. Corn: I want to ask it for impeachment. With reference to going out to the Carolina Pines, he stated——

The Court: Go ahead.

By Mr. Corn:

Q. You went to the Carolina Pines with Joe Berman, didn't you?

A. With Mr. Berman and Joel Lesnick, yes.

Q. Now, are you presently in jail?

A. Yes.

Q. On a narcotics charge?

A. Yes.

Q. And were you convicted of that narcotics charge?

A. Don't all convicted people go to jail?

The Court: Answer the question, Mr. Black.

[fol. 47] The Witness: Yes, yes.

The Court: You could have plead guilty. There is a difference, you know.

By Mr. Corn:

Q. Was this a felony?

A. Yes.

Q. And was the jail sentence a condition of probation?

A. Three years, yes.

Mr. Corn: No further questions.

One final—are you in fear of your life in jail now if you were known to be an informant?

A. I am not a know snitch, if that is what you mean.

The Court: Know what?

The Witness: Rat informer.

The Court: Well, Mr. Paonessa; what is your theory, why there is no probable cause here?

Mr. Paonessa: Well, separating the two, what I believe is the two legs upon which they stand, one is the fact that they saw—Officer Warthen says he saw Mr. Ker with Mr. Murphy on the evening of July 27th.

The Court: Just a moment, we don't have to inconvenience Mr. Black.

Mr. Paonessa: He may be excused. I have no further questions.

[fol. 48] Just seeing Mr. Ker alone on this occasion, nothing passed between Mr. Ker and Mr. Murphy. The evidence that Officer Warthen actually saw Mr. Ker is not strong. He saw a car which he very conveniently forgot the license number to, and he claims that he recognized Mr. Ker. Well, naturally, he has seen him several times since then. But this, of itself, does not seem to—an officer always takes a license number down when he is pursuing a car and he wants to establish the identity of the owner. Now, he claims that he did this and he wired up to the Department of Motor Vehicles, and that is where he found out who this person was.

Well, I think, that this is weak, and I think that in this case there was certain information given to the Police officers, not the way Officer Warthen testified, but by a person who may have been attempting to release him by providing the officers with some information that he felt the officers were seeking, and I think I should be able to know who this informer is so that I can go into his reliability and try to determine whether or not he was telling the truth. Now, they haven't provided me with the name of this person, whether or not it was actually Roland Murphy or some other person.

The Court: They have informed you that Mr. Black——

Mr. Paonessa: They have informed me——

The Court: The fact Mr. Black denies it does not [fol. 49] mean the Court has to believe him, do I?

Mr. Paonessa: No, your Honor, naturally you are the judge of Mr. Black's credibility, but I was getting to that point. I feel that Mr. Black denies that he ever had any knowledge that either of these defendants were ever connected with narcotics.

The Court: Well, Mr. Paonessa, since when is that testimony and a person is charged with an offense, you can bring in 10,000 people who can say they never heard of him connected with an offense like that. Is that testimony? That is kind of negative. You can ask a person if you ever heard of a person——

Mr. Paonessa: Yes, but I feel in this case the information provided, that Mr. Bernian claims he was provided by Mr. Black, has been challenged. I feel that for the protection of these defendants we should have the name of some of these other informants so that we can find out just who all is involved in this charge against the defendants so that we can properly prepare the defense. They are claiming the defense that they are claiming somebody must have had something against them to try and get them in the trouble that they have gotten them into. I am trying to determine who this person was.

The Court: I don't think it's upon the—incumbent to [fol. 50] furnish the name of the informers, and I don't think it would have any significance as far as their preparing the defense is concerned. Now, I think I have listened very patiently to this testimony and the Court rules that there

is sufficient probable cause to proceed in this action. You are placing the Court in a position of believing Mr. Black instead of the officers which is very awkard for me to do at this time. It may very well be that.

If I feel the State isn't proving their case and they rest, you know I have the authority to dismiss the Information any time I wish, and if I feel there is a great injustice going to be done, I will do it. Therefore, the Court determines it is probable cause, and we will proceed tomorrow morning with this case.

Mr. Paonessa: Thank you.

(Whereupon the Court adjourns at 3:37 p.m.)

[fol. 51] Santa Monica, California, October 25, 1960, 10:00 A.M.

The Court: Are you ready to proceed with your opening statement?

Mr. Corn: Yes, I will waive opening statement, your Honor.

The Court: All right, do you wish to make an opening statement?

Mr. Paonessa: Not at this time, your Honor.

The Court: Very well, proceed, Mr. Corn.

Mr. Corn: Mr. Weiland.

Tom Weiland, called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please. State your full name for the record.

The Witness: Tom Weiland.

Direct examination.

By Mr. Corn:

Q. Mr. Weiland; what is your occupation?

A. I am a forensic chemist employed by the Los Angeles County Sheriff's Crime Laboratory.

[fol. 52] Q. As a forensic chemist, what are the functions of your position?

A. The duties of a forensic chemist entail the analysis of various phases of physical evidence that might be involved in crimes. They would include such things as narcotics, blood alcohols, tool marks, hairs, fibers, ballistics, things of that nature.

Q. Counsel, may it be stipulated that this witness is an expert qualified forensic chemist?

Mr. Paonessa: It may be stipulated that he is an expert qualified forensic chemist, but whether he is an expert to identify the substance, I would like to question him on.

Mr. Corn: You may take him on voir dire, if the Court has no objection.

The Court: Yes, if you would like to do that.

Mr. Paonessa: Yes, I would like to do that.

The Court: All right.

Voir dire examination.

By Mr. Paonessa:

Q. Mr. Weiland, the word "forensic" before chemist, just denotes that you are employed by a police agency as a chemist, is that not true?

A. That and also literally a talking chemist, one who describes what he does.

[fol. 53] Q. And in identifying any of the substance here, which lays on the counsel table, did you perform any chemical analysis?

A. In only one of the items present in those packages did I perform any chemical test.

Q. And what was that chemical test?

A. The chemical test was a preliminary test to determine the presence of any possible narcotics. It is called

Mayers reagent, and was added to the solid dose of pills or tablets contained within that evidence.

Q. Did that indicate that there was any——

Mr. Corn: If your Honor please, we are attempting to make a determination of the qualifications of this man, not going into the evidence.

Mr. Paonessa: I withdraw that question.

The Court: Very well.

By Mr. Paonessa:

Q. And the other substances laying on the table, did you perform any chemical analysis of those substances?

A. If I may refer broadly to the leafy substance within those envelopes, I performed no chemical test, no, sir.

Q. No chemical test?

A. That is correct.

Q. By what means did you attempt to identify the substance?

[fol. 54] A. By visual observation under a microscope, using approximately four times magnification.

Q. And this substance—was this substance a plant substance?

A. It was, sir.

Q. Have you had any training as a botanist?

A. I have courses in forestry and similar lines, not per se forestry, no, sir—not per se botany, pardon me, sir.

Q. Have you had any training or have you made any study of the classification of plant life according to the characteristics of its component parts?

A. Somewhat, primarily with reference to those limited plants that become involved in criminal matters.

Q. Have you studied the classification of plants that you say come within criminal matters that you have studied, have you studied other plants in the same family group as the plants that you studied in relation to crimes?

A. With particular reference to one that is in general the Mulberry family, and some in a neighboring family, the Nettle family, I have studied some of these, I have not studied all of them, however.

The Court: Let us proceed, counsel.

Mr. Paonessa: All right.

The Court: Very well, proceed, Mr. Corn.

[fol. 55] Direct examination (Continued)

By Mr. Corn:

Q. Do you have any special degrees?

A. I do, sir.

Q. What are these degrees?

A. I have a Bachelor's Degree in Physiology from the University of California at Berkeley. In addition, I spent three years of graduate work in the field of forensic chemistry, also at the University of California at Berkeley, completing the course work, but not the thesis. I was employed by the University teaching and research in the field of chemistry.

Q. How long have you been a forensic chemist employed as such?

A. Since August of 1956.

Q. And have you seen marijuana before?

A. I have, sir.

Q. And how many times would you say that you have made examinations and tests on marijuana?

A. Any number would be subject to some error. It would number in the thousands.

Q. How many times have you testified in court before as an expert chemist?

A. In——

Q. Both Municipal and Superior.

A. In all types of cases, approximately 1,000 times.

[fol. 56] Q. Your Honor, I offer this witness is qualified.

The Court: Eminently qualified. Let us proceed.

By Mr. Corn:

Q. Now, if the Court please, I have here three packages, one, a small manila envelope which I ask be marked People's—strike that. Withdraw it.

Mark them as they are already marked.

One, a large rectangular manila envelope which I ask be marked People's 1 for identification. One, a bulky lighter color envelope which I ask be marked People's 2

and the other, a small rectangular envelope which I ask be marked People's 3.

The Court: Very well.

By Mr. Corn:

Q. I show you People's 1 and People's 2, sir, and ask you when was the first time you observed these items.

A. I first observed People's 1 and People's 2 for identification on the 2nd day of August, 1960.

Q. Where?

A. At the Sheriff's Crime Laboratory in Los Angeles.

Q. And who gave them to you?

A. The time I first saw them they were in the Narcotics Storage cabinet of the Crime Laboratory.

Q. And in what condition were they?

A. Both envelopes were sealed. I opened them by cutting across one end of the envelope.

[fol. 57] Sealed with a red sealing wax?

A. That is correct, sir.

Q. Now, will you open People's 1? We have a problem here, your Honor, sort of loose—

The Court: Very well.

Mr. Corn: If the Court please, pardon me—

The Court: Maybe we ought to get a newspaper. Get one of the bulletins on the little stand.

(Whereupon the Bailiff supplies a newspaper in front of the witness on the witness stand.)

By Mr. Corn:

Q. People's 1 displays a smaller rectangular package wrapped in brown paper and containing what appears to be a green leafy substance. Was this within People's 1 for identification when you received it?

A. It was.

Q. Did you open it by cutting around the red seal?

A. I opened by cutting the opposite end from the red sealed end.

Q. And would you describe People's 1 for identification?

A. Within the envelope I found this brown wrapped

paper having within it approximately two pounds of a green leafy substance.

Q. Now, did you subject this green leafy substance [fol. 58] to any type of examination?

A. I did, sir.

Q. And what type of examination did you subject it to?

A. A physical examination using magnification of a microscope.

Q. Why did you do that?

A. To determine, if possible, what the substance was by identification of various characteristics on the leaves and seeds of the plant.

Q. And did you form any opinion as a result of that examination?

A. I did, sir.

Q. And what was that opinion?

Mr. Paonessa: Objection, your Honor, I don't believe the proper foundation has been laid to allow this witness to give his expert opinion as to the nature of this substance, and if I—if we may approach the bench, I'd like to discuss that.

The Court: Very well, you may approach the bench.

(Whereupon a discussion was held at the bench between counsel and the Court, outside the hearing of the jury and not reported.)

The Court: You may answer the question.

The Witness: As a result of my analysis I formed the opinion that the leafy substance within People's 1 for [fol. 59] identification consisted of fragments of the plant Cannabis Sativa, known as Marijuana and Indian hemp.

By Mr. Corn:

Q. Incidentally, you have examined substances similar to this before?

A. I have, sir.

Q. And have you had—strike that, I withdraw it.

Do you know how many cigarettes, if any, could be made from this amount of marijuana?

A. I could calculate, I do not know.

Q. Approximately?

Mr. Paonessa: Your Honor, I move that how many cigarettes could be made is immaterial to this case.

The Court: Overruled, he may answer. You can give it approximately.

The Witness: Approximate figure from my experience would be about 800 cigarettes from that quantity. I may be in error—800 to 1600 cigarettes—somewhere within that range.

By Mr. Corn:

Q. I show you People's 2 for identification and ask you to examine the contents thereof and describe them as you do, if you please.

A. Within People's 2 for identification I found a brown paper bag having within it approximately one-half ounce of a leafy material, a box having within it a piece of cardboard and about one-half ounce of a leafy material, a green [fol. 60] plastic vial having within it tablets and also an eye-dropper attached to a white piece of paper.

Q. Did you examine any of these articles to determine whether or not there was anything of a narcotic nature?

A. I did, sir.

Q. Did you find anything of a narcotic nature in any of these articles?

A. I did.

Q. Which article?

A. Within the bag to which I first referred and the box, I found this leafy substance.

Q. Inside this green box—white box—

A. That is correct.

Q. —you found a green leafy substance. And inside the bag you found some additional green leafy substance?

A. I did.

Q. And did you subject this to a microscopic examination?

A. I did, sir.

Q. And what did you determine, if anything?

A. As a result of this examination I formed the opinion that the—

Mr. Paonessa: Same objection, your Honor, if I may renew it. I don't believe the foundation

[fol. 61] The Court: Objection overruled. He may answer.

Mr. Corn: If the Court please——

The Court: I ruled, let us proceed.

The Witness: The leafy substance within the bag and the box consisted of fragments of a plant Cannabis Sativa known as Marijuana or Indian hemp.

By Mr. Corn:

Q. Incidentally, Mr. Weiland, is there any other test that you would use to determine whether or not this was marijuana?

A. There are other tests available. I, myself, wouldn't use them.

Q. Why not, sir?

A. The other test is known primarily as the Duquenois, I believe, Moustapha which is a chemical test. I do not consider it first, specific, second, reliable, and third, in the application of the test I do not believe it reveals the presence of anything which is indicative any more than that which could be observed under a microscope.

Q. Why do you prefer the microscopic test?

A. Basically in my experience with this plant substance I have never found any plant which even closely resembles it in all physical characteristics.

Q. Now, I show you People's 3 for identification and ask you to examine the contents thereof and describe it.

[fol. 62] A. People's 3 for identification within this I found a paper package having within it several seeds and a waxed paper bag having within it a quantity of loose leafy substance. I analyzed first that substance within the paper container, and found therein two seeds which I identified from the plant known as Marijuana and other seeds not Marijuana.

Q. Two seeds of Marijuana in this Scotch tissue towel?

A. That is correct. Within the waxed paper bag I found this quantity of loose leafy material which I found to be Marijuana.

Q. What did you do with these items after you examined them?

A. Upon the completion of the analysis I placed the items back in the envelopes from whence they came, sealed them with cellophane tape and placed them on shelf July in the Sheriff's Narcotic Locker at the Crime Laboratory.

Q. When did you bring them to Court?

A. I did not bring them to Court.

Q. Who brought them to Court, if you know?

A. I would have to speak from laboratory record, I have no independent recollection of that.

Mr. Corn: Cross-examination.

The Court: Proceed.

[fol. 63] Cross-examination

By Mr. Paonessa:

Q. Mr. Weiland, you found some tablets in one of those exhibits. Did you perform a chemical test to determine whether those tablets contained any narcotics?

A. I did, sir.

Q. And what was the result of that test?

A. As a result of that test I determined that the tablets which I tested did not contain any narcotic.

Q. Now, you testified that you didn't perform any chemical test on any of the other substances. You merely observed it under a microscope?

A. That is reference to all of the leafy material, that is correct.

Q. Have you ever made in your career, have you ever made a general survey of the field of plant life to determine the characteristics of all the particular plants and how they were classified?

A. At best it would be called generally brief. I have not specifically studied the field of Botany in detail.

Q. Now, you refer to this substance, you call Marijuana, by its scientific name as Cannabis Sativa.

Now, which of those words denote the genus of this plant?

A. The word "Cannabis" denotes genus, the species, [fol. 64] Sativa.

Q. Do you know how many species there are in the genus "Cannabis"?

A. A total number—I do not know. There is Cannabis

Americus, Cannabis Indicus. There are a couple of others that I cannot recall at this time. They have the same characteristics of Sativa and are generally classified under the term "Sativa," the other term indicating primarily the area—the area of origin or growth.

Q. Have you made a study under the microscope of these other types of Cannabis plants?

A. Referring to Americus and referring to Indicus, I have observed both of those, yes, sir.

Q. And do they have the same characteristics as Cannabis Sativa?

A. Insofar as a leaf structure, physical things present on the leaf and seed structure, they do, yes, sir.

Q. Can you say that the substances you examined in these exhibits were not Cannabis Americus or the other Cannabis which you referred to?

A. I can state that they are Sativa, whether as a subheading here Americus, Indicus, and I believe another one I honestly can't recall the others. I could not state what the origin of these particular plants were, no, sir.

Q. Would Cannabis Americus be a form of Marijuana? [fol. 65] A. It would, sir.

Q. And Cannabis Indicus?

A. It would, sir.

Q. And then is it your testimony that all the Cannabis plants are a form of Marijuana?

A. Those falling under the general and inclusive Cannabis Sativa are the Marijuana group.

Q. Well, then, have you made any study of any of the other plants falling under the heading "Cannabis" aside from Cannabis Americus or Cannabis Indicus and Cannabis Sativa?

A. At this time in all honesty I cannot recall what other plants fall under the generic name "Cannabis", and therefore could not answer whether I have or have not made such a study.

Q. Are all the plants which fall under the heading, "Cannabis", would they all fall under the term "Marijuana"?

A. I believe so, I am not definitely positive on that.

Q. In other words, there may be some other Cannabis plants which have characteristics very similar to what you

found in these exhibits which are not of a narcotic nature, is that not true?

A. This is possible. I honestly do not recall at this time to the best of my recollection all of the Cannabis plants [fol. 66] belonging in the general category Marijuana, but I could not state that definitely.

Q. But, as far as you know, there is a possibility that there are other Cannabis plants which have characteristics very similar to the substances which you examined in these exhibits, is that not correct?

A. As with anything wherein all things have not been tested, this, of course, would be possible, yes, sir.

Q. Now, you say you are familiar with the Nettle family of plants. Is the genus Cannabis a member of that Nettle family of plants?

A. There is conflict even in the field of Botany as to whether this falls in the Nettle family or in the other family which is—I mentioned it before—a Mulberry type.

Q. Mulberry?

A. It is currently believed to the best of my knowledge that this falls within the Mulberry family rather than the Nettle family. This has gone back and forth in the field of Botany over the past year.

Q. Now, it then either belongs to the Nettle family of plants or the Mulberry family of plants, according to your testimony?

A. To the best of my knowledge that is correct, sir.

Q. Now, have you made a close examination of all the [fol. 67] plants, all the other plants within the Mulberry family of plants?

A. As pertaining to the close physical and microscopic examination thereof, I have not.

Q. Then, as far as you know, there may be other plants within the Mulberry family of plants that have characteristics very similar to the characteristics which you observed in these exhibits?

Mr. Corn: Your Honor, that calls for speculation. He has no way of knowing one way or the——

The Court: Can you answer that question?

The Witness: The answer would be similar to one given previously, as with all things that have not completely been

tested this is possible. I have not so encountered such a plant myself.

The Court: Let us proceed.

By Mr. Paonessa:

Q. Now, have you examined all the plants within the Nettle family of plants?

A. The same answer again as applies, I have not.

Q. You have not.

Then, can you say for definite—can you say definitely that the substances which you examined in the exhibits before you were not from another plant within the Mulberry or Nettle family?

A. Again, based on my observations and plants that I have studied, I have found no plants to have exactly the [fol. 68] same characteristics as the plant Cannabis Sativa. Again I have not studied all of them and I could not state definitely that there is not one that could not have characteristics, either partially or in toto that would resemble this plant. I have not so encountered it myself.

Q. And you didn't—you say there are certain chemical tests that could have been used to ascertain whether or not this leafy substance and seeds which you found did—were narcotic in nature, is that not true?

A. That is not true, no, sir. If I may explain.

There are these chemical tests available which test for the higher linear alcohol known as tetrahydro-cannabinol. If this is a narcotic, or assuming that this is the narcotic, then tests are available for this particular higher alcohol. It has never been proven to my satisfaction that this substance or one closely allied to it, the Cannabinol, that either one of these are the narcotic principal, therefore, to test for either one of these and determine their presence would not, in my own mind, indicate the presence of a narcotic.

Mr. Paonessa: Q. In other words, you made no clinical test on this leaf, the plant substances in those exhibits?

Mr. Corn: Asked and answered, your Honor.

The Court: I th[illegible] it has been answered. He can answer it again, if Mr. Pa[illegible]ssa wants it again.

[fol. 69] By Mr. Paonessa:

Q. In fact, you made no chemical test to determine the nature of the plant substances you found, is that not correct?

A. That is correct.

Q. Now, you say there were some seeds found, two of which you identified as probably Cannabis Sativa, as far as you could tell, and too—some other seeds which were of another nature. Do you know what plant those seeds were from?

A. I do not at this time recall even what they look like. I know that at the time I made the analysis they did not—they were not in my opinion Marijuana seeds.

Q. Did they belong to the Mulberry family of plants?

A. Again, I do not even recall their gross characteristics and could not state what family to which they belong.

Mr. Paonessa: I have no further questions.

The Court: Step down, please.

Mr. Corn: Your Honor——

The Court: Excuse me. Go ahead, by all means.

Redirect examination

By Mr. Corn:

Q. You say you examined Marijuana how many times?

[fol. 70] A. I do not know the exact number.

The Court: Great many times, he said. Let us proceed.

By Mr. Corn:

Q. Your Honor, I think this is very material to the case of the People.

The Court: He already said he examined it many, many times.

Mr. Corn: I would like to know how many, approximately, if you can recall.

The Witness: Any number would be subject to error.

By Mr. Corn:

Q. Over how many years, Mr. Weiland?

A. I first looked at Marijuana in 1954 and had much more concentrated experience with it since 1956.

Q. Have you examined it in bulk before?

A. I have, sir.

Q. And when it appears in bulk, does it appear similar to the item People's 1, the bulky leafy green substance?

A. With reference to the brick-like substance wrapped in paper, it frequently appears in that form, yes, sir.

Q. Have you ever seen any by-products of the Mulberry family, nettlebush family, packed in that bulky——

A. In my experience with the Crime Laboratory, I have not.

Mr. Corn: Thank you. No further questions.

[fol. 71] Recross-examination

By Mr. Paonessa:

Q. Just a few more questions:

Mr. Weiland, now, you say the first time you examined substance like Marijuana was in 1954. At that time someone placed that before you and said, "This is Marijuana, this is what it looks like," is that not true?

A. In essence that is true, yes, sir.

Q. And you didn't make an examination of all the plants related to that plant to determine the distinguishing characteristics of the Cannabis Sativa, did you?

A. Of all of the neighboring plants, no, sir. This first exposure to Marijuana I was to pick it out from among 20 allied plants of various natures to include how old the species, and similar such things. This was the preliminary training which I had in Marijuana.

Q. And, based on that first observation, you have been more or less going along saying whatever you saw that looked like it was Cannabis Sativa, is that not true?

A. Based on that, and also the assistance when I joined the Crime Laboratory of persons who have looked at Marijuana over numerous years—well, in excess of 20 years——

Q. Were any of your instructors trained in the field of Botany?

Mr. Corn: Your Honor, we are going——

[fol. 72] The Court: That is too remote, Mr. Paonessa. Let us proceed.

Mr. Paonessa: All right. No further questions.

The Court: Step down. Let us proceed, Mr. Corn, with the next witness.

Mr. Corn: Yes; your Honor.

Mr. Berman.

Leo Berman, called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please. State your full name for the record.

The Witness: Leo Berman, B-e-r-m-a-n.

Direct examination

By Mr. Corn:

Q. Mr. Berman, what is your occupation?

A. Deputy Sheriff, Los Angeles County, assigned to the Headquarters Detective Division, Narcotics Detail.

Q. How long have you been on the Narcotics Detail?

A. Approximately three years.

Q. Incidentally, you have a—hair on your chin. Is that a standard uniform for Deputy Sheriffs?

A. This is used in undercover activities, if the people [fol. 73] you are associating with use beards as part

Q. You use that on your job? The Department does not smile on that for the average Deputy Sheriff?

A. That's correct.

Q. Now, sir, are you the arresting officer or one of the arresting officers in this case?

A. I am.

Q. When and where did the arrest occur?

A. It occurred at approximately 9:00 p.m. on July 27, 1960, at 4108 West Shauson Avenue, Apartment 29, Los Angeles.

Q. Pursuant to an investigation, you went to that address?

A. That is correct.

Q. And is that an apartment house?
A. That is correct.
Q. Did you go to an apartment in that house?
A. I did.
Q. What apartment number?
A. 29.
Q. Did you look at the mail box as you entered?
A. I did.
Q. Did you notice the name of the owner of the apartment on that mail box?
A. I did.
Q. What was the name?
[fol. 74] A. George Ker.
Q. Did you gain entry into the apartment?
A. I did.
Q. How did you gain entry?
A. With a key that we was supplied by the apartment house manager.
Q. And you entered the apartment?
A. That is correct.
Q. Who was with you at that time?
A. Sergeant Warthen and Deputy Marvin Love.
Q. Is Sergeant Warthen to my right over here?
A. That is correct.
Q. Now, when you entered the apartment, was there anyone in the room that you entered?
A. That is correct.
Q. There was?
A. There was.
Q. Who was there?
A. The defendant, George Ker.
Q. And where was he?
A. He was seated on the couch in the living room of the apartment.
Q. Do you know how large this apartment is, incidentally, how many rooms?
A. There is a large living room, a kitchen, a bathroom and one bedroom, I believe.
[fol. 75] Q. And the doorway to the kitchen, where does that enter?
A. That enters—there are two doorways, one enters from the living room.

Q. Speak up sir.

A. One enters—one of the doorways enters into the living room leading to the kitchen and the other from a hallway which leads to the bedroom.

Q. Now, could you tell us exactly in sequence and detail what happened when you and Sergeant Warthen entered that apartment?

A. We entered the apartment, I observed the defendant, George Ker, to be seated on the couch in the living room. As we entered he stood up and faced us. I displayed my identification, stated, "We are Sheriff's Narcotics Officers, conducting a narcotics investigation." Simultaneously to that statement the defendant Diane Ker, walked from the kitchen into the living room. I identified myself to her, stated the same facts, then immediately walked to the kitchen without entering, standing in the doorway I observed a small scale on the top of the sink. The top of the scale was the brick-like—brick-shaped package containing the green leafy substance.

Q. This scale was on top of a sink?

A. That is correct.

Q. Were there any pots or pans or anything around [fol. 76] it?

A. I believe there was a knife laying on the sink, other than that I don't recall.

Q. What about the paper on this green leafy substance?

A. It was in the same position it is now with a small rip in the package.

Q. And this scale, where was it with relationship to the sink itself?

A. It was on top of the sink at the—just west of the sink, approximately at a foot it would be in the middle of the sink.

Q. Continue.

A. I then called or beckoned both defendants and Sergeant Warthen into the kitchen. They came over. I pointed to the package, I said, "what is this?" And the defendants answered they did not know. I said, "It appears to be Marijuana to me. Is it yours?" And there were no comments made by the defendants.

Q. What do you mean, "No comments?" Did they say anything at all?

A. There was no answer to my question.
Q. You said, "Is it yours?"
A. That is correct.
Q. And nothing was said at all?
A. No answer came from either defendant.
[fol. 77] Q. Then what happened?
A. I then advised the defendants that they were under arrest for suspicion of violating the State Narcotic Law.
Q. You have been on the Narcotic Detail how long?
A. Approximately three years.
Q. Have you made any narcotics arrests with Marijuana before?
A. I have.
Q. How many, approximately, if you know?
A. In excess of 300.
Q. And you know Marijuana when you see it?
A. I do.
Q. And seeing that Marijuana at that place, People's 1 for identification, did you place them under arrest for the possession of Marijuana?

Mr. Paonessa: Your Honor, I object to this——
Mr. Corn: I am laying a foundation.
Mr. Paonessa:—this officer identifying the substance. He is not qualified. He is just a laymen in the field.
The Court: He can testify he thinks it's Marijuana. It has already been identified to by an expert as to what it is. Let us proceed.

By Mr. Corn:

Q. If the Court please, I do wish the Court to comment with reference to counsel's objection as to this—as to this [fol. 78] officer being an expert. I submit to the Court with the foundation that is laid this officer is an expert as to Marijuana.

The Court: Let us proceed.
Mr. Corn: Would the Court comment?
The Court: Yes, he may answer the question.
Mr. Corn: Thank you.

By Mr. Corn:

Q. You placed the defendant under arrest for possession of Marijuana?

A. That is true.

Q. What happened then?

A. I then asked the defendants if they had any other narcotics or contraband in the apartment. They answered they did not. We then conducted a search in the presence of the defendants throughout the rest of the apartment. We entered the defendants' bedroom. It was a one-bedroom apartment. I asked them if this was their bedroom. They stated it was and during this search of the bedroom I observed this box.

The Court: Identify it. Which is that?

The Witness: This is——

Mr. Corn: People's 2 for identification.

The Court: Very well.

The Witness: And its contents to be, atop a dresser in the bedroom. I asked the defendants if this was theirs and they refused to comment. Once again they refused to [fol. 79] answer the question.

Q. By "Refused to answer" do you mean to say they stated they refuse or didn't say anything?

A. They didn't say anything.

Q. Remained silent?

A. That is correct.

Q. Was this green leafy substance inside that box at the time that you observed it?

A. It was.

Q. And this box was located on top of a dresser?

A. That is correct.

Q. Was there anything else on top of this dresser?

A. I believe there were some papers and possibly jewelry box.

Q. Was anything on top of the box or was it out in the open?

A. The box was out in the open.

Q. Then, what happened?

A. We continued the search, finding the green bottle containing the tablets and the eye-dropper within the chest of drawers.

Q. Then what happened?

A. The defendants along with the evidence, were transported to the Sheriff's Lennox Station and booked on the charge of suspicion of violating the State Narcotic Laws, [fol. 80] the evidence marked for identification, placed and sealed in the envelopes.

Q. These envelopes that you have before you now?

A. That is correct.

Q. Sealed with red sealing wax?

A. That is correct.

Q. Did you transport them down to the Sheriff's Narcotics Laboratory?

A. I believe Deputy Markman and myself did, yes, sir.

Q. Did you pick this up from the Sheriff's Narcotics Laboratory on the date of the preliminary hearing, which was——

Mr. Paonessa: August 3.

Mr. Corn:—August 3, 1960?

The Witness: Deputy Markman and myself picked up the packages.

By Mr. Corn:

Q. And brought it into Court?

A. That is correct.

Q. All of this occurred in Los Angeles County?

A. It did.

Mr. Corn: You may cross examine.

Cross-examination

By Mr. Paonessa:

Q. When you first went into the apartment of Mr. and [fol. 81] Mrs. Ker, how was Mrs. Ker dressed?

A. I believe she had a duster on, dressing gown on.

Q. And isn't it true that when you and the other officers went into the apartment, that Mrs. Ker more or less backed into the kitchen to hide herself from these strangers?

A. That is not true.

Q. You didn't observe that, in other words?

A. I observed her to walk from the kitchen into the living room.

Q. Did she walk directly into the living room or did she remain by the door and sort of trying to hide herself from visibility because of the scanty nature of her dress?

A. She stepped approximately three full steps into the living room, at which time I identified myself.

Mr. Paonessa: I have no further questions.

The Court: Step down please. Proceed, Mr. Corn, with your next witness.

Mr. Corn: Mr. Warthen, please.

ELVIS A. WARTHEN, called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please. State your full name [fol. 82] for the record.

The Witness: Elvis A. Warthen, W-a-r-t-h-e-n.

Direct examination

By Mr. Corn:

Q. Mr. Warthen, you are a Los Angeles County Deputy Sheriff attached to the Narcotics Detail?

A. Yes, sir.

Q. How long have you been so attached to that Detail?

A. Narcotic Detail, approximately four years.

Q. And you are one of the arresting officers in this case?

A. Yes, sir.

Q. You have made Marijuana arrests before?

A. Yes, sir.

Q. How many times?

A. Quite a few hundred, I don't know the exact number.

Q. How many times have you seen Marijuana before?

A. On several hundred occasions.

Q. You know what Marijuana is when you see it?

A. Yes, sir.

Q. Now, I direct your attention to the contents of People's 2 for identification and ask you, did you observe any of

these articles in the course of your search, other than—[fol. 83] strike that—what has already been testified to?

A. This 2?

Q. Yes, that is part of 2.

A. Yes, sir.

Q. This brown manila bag?

A. Brown manila bag.

Q. Where did you find this?

A. Found that in a cupboard in the kitchen.

Q. Speak into the microphone. In the cupboard in the kitchen?

A. Yes, sir.

Q. Did you speak to the defendants about it?

A. Yes, sir.

Q. What did you say to the defendants about that?

A. When I pulled it out of the cupboard I examined the contents of it, asked them who it belonged to and neither one of them answered my question.

Q. They remained silent?

A. That's correct.

Q. Now, did you have any conversations with the defendants concerning their cars?

A. Yes, sir.

Q. Will you please relate that conversation?

A. I asked both of them together if they had any other [fol. 84] automobile other than the Chrysler product that I had originally observed defendant Ker driving earlier in the day, and they stated that they did not. That was the night of the arrest on the 27th day of July.

Q. Was defendant, Diane Ker, Mrs. Ker, in—present when you asked that question?

A. Yes, sir.

Q. Did you ask that question of her?

A. I asked it of both of them together, as I recall. Douglas Ker answered my question, stating that they did not have any other vehicle.

Q. Did Mrs. Ker indicate her assent or do anything when you said that?

A. I don't believe, as I recall, that she made any answer at all.

Q. She remained silent?

A. Yes, sir.

Q. Did you subsequently make investigation concerning the cars of the defendants?

A. Yes, sir.

Q. Did you have any information concerning a car owned by one Diane Ker?

A. Yes, sir.

Q. Pursuant to that, did you go to a car?

A. Yes, sir.

Q. When?

[fol. 85] A. That was, as I recall, approximately noon, 12:00 noon on the 28th day of July, 1960.

Q. Did you see a registration slip in the car?

A. Yes, sir.

Q. Whose name was the car registered to?

A. Diane Ker.

Q. Did you make a search of that car?

A. Yes, sir.

Q. What did you see in that car, if anything?

A. I found some seeds under the rear seat of the vehicle. I found what appeared to be a lunch bag, sandwich bag, paper bag, which was under the dashboard on the driver's side of the vehicle containing—the bag contained a green leafy substance resembling Marijuana.

Q. This was under the dashboard?

A. That's correct.

Q. And these are the contents of People's 3 for identification?

A. This appears to be the brown—the wax paper sandwich bag that was under the dashboard—the paper towel is one that I placed the seeds in, that I found under the rear seat of the vehicle.

Q. And you placed it in People's 3 for identification, sealed it with red sealing wax?

A. That's correct.

Q. And delivered it to the Sheriff's—strike that—and [fol. 86] gave it to Deputy Sheriff Berman?

A. That's correct.

Mr. Corn: You may cross examine.

Mr. Paonessa: I have no questions of this witness.

The Court: Step down, please.

Proceed, Mr. Corn.

Mr. Corn: Your Honor, I ask that the evidence, People's 1, 2 and 3 for identification and their contents be received into evidence.

The Court: Any objection?

Mr. Paonessa: No objections.

The Court: It may be received.

Mr. Corn: The People rest, your Honor.

The Court: We will take a ten minute recess.

Ladies and gentlemen of the jury, report back in ten minutes. Remember my admonition about discussing this case with anyone.

(Whereupon at 10:55 a.m., the mid-morning recess was taken.)

The Court: Proceed.

DEFENSE

Mr. Paonessa: May I, your Honor, please——

The Court: Do you wish to make an opening statement now?

[fol. 87-96] Mr. Paonessa: Yes, your Honor.

The Court: Very well, by all means.

(Whereupon counsel for defendants makes an opening statement which was reported, but is not transcribed herein.)

Mr. Paonessa: Mr. Kerr, would you take the stand, please?

. . . . . .

[fol. 97-210] GEORGE DOUGLAS KER

Direct examination

By Mr. Paonessa:

. . . . . .

A. Well, I didn't know what was going on and I stood up from my position sitting on the couch, and the officers came in, said, "You are under arrest", and handcuffed me. Two of them handcuffed me. One went into the bedroom, the other officer went into the kitchen, right past my wife

where she was standing right at the doorway there, and then come out and said, "Is this yours? We want you to come in here and see this". So we went in there, well, they took us in there, and said, "Is this yours?" I said, "No." They asked us if we had any knowledge that it was there, if it was ours, and we said, "No", it wasn't ours, and we didn't know how it got there. They had asked us these questions and we had just answered, "No."

. . . . . .

[fol. 211] REBUTTAL

Mr. Corn: Sergeant Keith.

DON L. KEITH, called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please.
State your full name, please.
The Witness: Don L. Keith.
The Clerk: Spell your last name, please.
The Witness: K-e-i-t-h.

Direct Examination

By Mr. Corn:

Q. Your occupation, sir?

A. Police Sergeant, City of Glendale.

Q. And how long have you been attached to that Police Department?

A. 14 years, sir.

Q. Are you a detective, sir?

A. No, sir.

Q. Do you have divisions over in the Glendale Police?

A. Yes, sir, we are a little different than some departments.

[fol. 212] Q. What division are you attached to?

A. I am presently attached to Training Division, sir.

Q. And back in 1957, did you have a conversation with one George D. Ker, the defendant in this case?

A. Yes, I did.

Q. And when and where did you have that conversation?

A. This was at approximately 5:00 a.m., I believe, it was the 17th and it was in a small room that we refer to as a Ozalid room machine in the old police building.

Q. Is this pursuant to an investigation concerning narcotics?

A. It was, yes.

Q. Who else besides yourself and the defendant were present?

A. Myself and the defendant only.

Q. Only. Now, did you have any conversation with the defendant about narcotics?

A. Yes, sir, I did.

Q. About Marijuana?

A. Yes, sir.

Q. What did you say to the defendant and what did he say to you?

A. I asked if he had been smoking Marijuana this particu- [fol. 213] lar evening or day and he stated, "No," that he had not. I asked if he had ever smoked Marijuana. He stated that he had but that he got no kick from it. I then indicated that from what I had heard and learned that one trial wasn't a fair trial insofar as Marijuana was concerned due to the fact it has a tendency to make a person sick the first time.

Q. Speak up, sir.

A. Pardon me, he stated that—I stated that it wasn't a fair trial, saying he had smoked it once and it didn't have any effect or kick, my understanding being that the first—first cigarette usually makes a person sick. He indicated that he had smoked it several times and that he got no kick from it.

Q. So he stated he smoked it several times, he got no kick from it?

A. Yes, sir.

Q. At any time did he tell you that the only time that he smoked Marijuana was when he was 10 years old?

A. No, sir, not the age 10 was never mentioned.

Q. He stated he smoked it several times?

A. Yes, sir, he did.

Q. Did you ever show him Marijuana during this period that he was at the police station?

A. During the course of the investigation there was Mari-
[fol. 214] juana out and present in our presence, yes.

Q. Did you show it to him?

A. Yes, he was——

Q. Did you identify it as Marijuana?

A. It was identified as Marijuana.

Q. And he saw it in your presence?

A. Yes, sir.

Mr. Corn: No further questions.

The Court: Do you have any cross examination?

Cross-examination

By Mr. Paonessa:

Q. Sergeant Keith, did you have Mr. Ker at the time sign any written statement to the effect that he had used Marijuana on several occasions?

A. No, sir, I did not.

Q. Is it not true that he told you that the one occasion that he had used Marijuana was when he was around 10 or 10 years old?

A. No, sir, the age 10 was not mentioned.

Q. Was the age 12 mentioned?

A. No it was not.

Q. He told you he used it one occasion, he used Marijuana was at a rather young age then, did he not?

A. He did not state on that one occasion he had used it, no, sir.

[fol. 215] Q. Did he indicate at the time how recently he had last used Marijuana or last smoked Marijuana?

A. No, sir, I don't recall specific time.

Q. And isn't it true, in other words, for a person to get the effect from smoking a Marijuana cigarette they have to be experienced in smoking it and know how to properly inhale and partake of it?

A. This is getting a little out of my field, I couldn't answer, sir. I am not being facetious, I am not trained in it.

The Court: I understand, a very intelligent answer. Let us proceed.

By Mr. Paonessa:

Q. Then, it is true that Mr. Ker never indicated when these occasions were that he used Marijuana?

A. Dates, time nor places was not mentioned, no, sir.

Q. And did you ask him just when he said, "several occasions", did you ask him just how many occasions?

A. No, sir, no, sir.

Q. Did you ever again relate these—this conversation to anyone——

A. The——

Q. —after, did you relate this conversation you had with Mr. Ker at this time back in October, 1957 to anyone else?

[fol. 216] A. Soon after the conversation, when it was made a matter of our departmental record, yes, sir.

Q. And do you have a copy of that record——

A. Yes, sir.

Q. —with you?

A. The Deputy District Attorney, Mr. Corn, has it.

Q. May I see that?

Mr. Corn: Is this the copy I have?

The Witness: This is the copy, yes, sir.

(Whereupon Mr. Corn hands a document to Mr. Paonessa for his perusal.)

Mr. Corn: I have not read that yet myself, so—

The Court: Well, that's all right.

Let us proceed, please.

By Mr. Paonessa:

Q. I draw your attention to——

Mr. Corn: If the Court please, if there is going to be any use of this document in evidence and it is going to be used——

The Court: The document is not going to be used. If it is a document prepared by this police officer and inconsistent with this testimony, he has a right to impeach him. Proceed.

Mr. Corn: That is correct; however, the thing should be before him at the time for the impeachment, it should be before him.

[fol. 217] Mr. Paonessa: I want to give you a chance to look at it first, counsel.

Mr. Corn: As I stated, I have not seen it yet myself.

If there is going to be any attempt to impeach I should have an opportunity to read this document, your Honor.

The Court: May I see those sentences that counsel——

(Whereupon Mr. Corn shows the document to the Court.)

The Court: Which sentence are you referring to?

Mr. Paonessa: The one at the bottom of this paragraph.

(Whereupon an off the record discussion was held between the Court and counsel, outside the hearing of the jury.)

The Court: You may show this to him. You have to read the whole thing later, if you want, on redirect. Show this to him first and then ask him the question.

By Mr. Paonessa:

Q. Now, you stated that in this conversation——

The Court: First, show it to him so he can read it.

Mr. Paonessa: I want to ask him a preliminary question.

[fol. 218] The Court: All right.

By Mr. Paonessa:

Q. You stated in conversation you had with Mr. Ker that he informed you that he had smoked Marijuana on several occasions, is that not true?

A. Yes, sir.

Q. Now, let me show you a sentence from your report which is at the end of this paragraph. Well, if you would read that whole paragraph over.

A. The entire paragraph?

Q. Well it's just the last three lines that I am interested in.

A. I see.

The Court: Read it to yourself.

The Witness: Yes, sir.

The Court: You may ask him the question. Let us proceed.

By Mr. Paonessa:

Q. Now, did you note any place in that paragraph that the word, "Several" was used?

A. No, sir, I did not.

Q. In fact, would you read—not the whole paragraph——

The Court: No, he does not have to read it, you read it.

Mr. Paonessa: Well, I would like to read the last——

[fol. 219] The Court: And the jury will decide what significance they are going to give it as far as any inconsistent statement is concerned.

Mr. Paonessa: I would like to read the last three sentences——

Mr. Corn: If the Court please, I submit this is highly improper. We should read——

Mr. Paonessa:—starting at the word "stated".

The Court: Mr. Corn——

Mr. Corn: Yes!

The Court: Mr. Paonessa may read what he wants to read to the jury, and if you want to read the statement afterward and if the question requires an explanation, let Mr. Keith explain it. The jury will decide what significance they wish to give this so-called impeachment. Now, let us proceed. He may read it. That is my ruling.

Mr. Corn: May I be heard, your Honor?

The Court: Yes.

Mr. Corn: That is correct, your Honor, but I have no idea what is going to be read with reference to what this witness has testified to.

The Court: Well, he told you the last three lines.

Mr. Corn: But this witness has not been asked whether these last three lines are the ones he responded to.

[fol. 220] The Court: What do you mean by "responded to"?

Mr. Corn: In other words, this witness has testified merely to one question, and one question alone with reference to this document, "Does the word several appear". He answered, "No, it does not appear." Now, counsel is going to read three lines from this document. The inquiry that I

posed to the Court is, do these three lines relate to the one question that has been asked of the witness.

The Court: Yes, read the three lines and if you wish, Mr. Keith may offer an explanation. I don't think it has much significance one way or the other. Let the jury attach the significance they wish to it. Proceed.

Mr. Paonessa: I will start about the middle of that paragraph where it says, "Sergeant Keith questioning pertaining to his whereabouts during the evening." That is referring to the defendant, Douglas Ker, "stated he wanted to—and so forth."

Mr. Corn: I beg your pardon, your Honor, "and so forth" is improper.

Mr. Paonessa: He wanted——

The Court: Read it.

Mr. Paonessa: "He wanted to talk to a lawyer first. However, after short questioning he stated to Sergeant Keith that he had used Marijuana before and it did not affect him at all. He got no kick." Now, that is——

[fol. 221] The Court: Is it your contention the word "before" limits it to one instance instead of several?

Mr. Paonessa: Yes, it is—that is my contention.

The Court: Well, I don't know. Let the jury decide what that is. Go ahead. Proceed.

By Mr. Paonessa:

Q. Now, that is your—your notation of the conversation?

The Court: You can explain that, Mr. Keith, if it requires any explanation.

The Witness: The information that you have here in this report was forwarded to the actual investigating officer who made out——

The Court: Did you prepare this report?

The Witness: No, sir, I did not.

The Court: Just a moment, Mr. Paonessa, he didn't even prepare this report.

Mr. Paonessa: What—did you——

The Court: That is sufficient. There is nothing to talk about. All that may be stricken about this report and take the report back.

Mr. Corn: Thank you, your Honor.

The Court: I was under the impression this officer made

that report. He certainly is not responsible for that report if he didn't make it.

By Mr. Paonessa:

Q. Do you have any other notes relating to the conversa-
[fol. 222] tion you had with Mr. Ker about two years ago?

A. No, sir, I do not.

Q. Is this—did you refresh your memory from this report before coming to Court today?

A. Yes, sir, I did.

Q. In other words, you have no independent recollection of the conversation other than refreshing your memory from this report, is that not correct?

A. I did after refreshing my memory, the instance returned.

Q. After refreshing your memory, but first you had to refer to this report, is that not true?

A. Yes, sir, I did.

Q. And you did not prepare this report yourself, someone else prepared it?

A. I did not type the report, no, sir.

Q. Now, in truth and fact, Mr. Ker did state to you upon this occasion that you refer to, that he had smoked Marijuana before but he didn't get much of a kick from it, is that not true?

A. My recollection is that he made the statement that he had smoked Marijuana but that he had got no kick from it.

Q. That is correct.

He had smoked Marijuana but he got no kick from it, and he didn't make any reference to the time when he [fol. 223] smoked Marijuana or how old he was or anything like that?

A. He didn't mention specific times or age.

Mr. Paonessa: No further questions.

Redirect examination

By Mr. Corn:

Q. How many did he mention, how many times though?

A. It was at that time that I indicated to him that from my general knowledge, as I testified to before, that I was

under the impression that one cigarette would probably make a person sick and you wouldn't derive the affects from a cigarette, and if was at that time that he stated he had tried it on several occasions and he did not get a kick from the Marijuana, did nothing for him.

Q. Let me ask you this, sir, you remember the occasion now, do you not, as it occurred then?

A. Yes, sir.

Q. And when was the first time this year that anyone spoke to you about George Douglas Ker? When was the first time I spoke to you about it?

A. Yesterday afternoon about 2:00 o'clock.

Q. When was the first time the Los Angeles County Sheriffs spoke to you about George?

[fol. 224] A. About 3:30 on my arrival here.

Q. And when I spoke to you yesterday afternoon around noon, was it around noon?

A. Shortly after noon, yes, sir.

Q. Did you tell me at that time substantially the same story that you told here on the stand today with reference to the number of times that the defendant had smoked Marijuana?

A. During our discussion it was—it was mentioned, discussed, yes.

Q. Fine.

The Court: Step down.

Mr. Corn: One further question, if I may.

By. Mr. Corn:

Q. How long was the defendant in the station, if you know?

A. Total time I couldn't say, sir. We were together perhaps half an hour, 20 minutes, half an hour.

Q. Do you know of your own knowledge how long he was in the police station?

A. I do not.

Mr. Corn: I see. Fine. Thank you.

No further questions.

The Court: Step down, please. Thank you.

Proceed with your next witness, Mr. Corn.

Mr. Corn: May I ask one or two more questions of this witness from where he is?

[fol. 225] The Court: All right.

By Mr. Corn:

Q. With reference to the preparation of this report. At this time were you a Sergeant?

A. Yes, sir, I was.

Q. And were you the investigating officer in the case in which Mr. Ker was involved, or were you another——

A. A supervising officer.

Q. You did not prepare any reports?

A. I did not.

Q. What is the normal operating procedure of your department with reference to preparation of specific police reports?

A. The field officer assigned to the incidents, or those discovering the incident, make the initial report and it is forwarded to the specific division for follow-up and Court preparation.

Q. When the Court preparation is prepared, it is typed up by someone else other than the individuals who actually observed——

A. Either by the investigating officer or by a stenographer.

Q. —from the various reports and information given?

A. Yes, sir.

Q. And they do copy any specific verbatim, do they?

[fol. 226] A. No, sir.

Mr. Corn: No further questions.

The Court: Proceed with your next witness.

Mr. Corn: Thank you.

Mr. Markman.

Marvin J. Markman, Called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please.

Mr. Corn: If the Court please, I was in error. May I have Mr. Warthen before Mr. Markman?

The Court: All right.

Mr. Corn: I am sorry, your Honor.

The Court: He has been sworn. You have been sworn, have you not? You testified before, did you not?

The Witness: I did——

The Court: Oh, this is the first time. Swear him then. I am sorry.

ELVIS A. WARTHEN, recalled as a witness on behalf of the People, having been previously duly sworn, was examined and testified as follows:

[fol. 227] The Clerk: Be seated, please.

State your full name.

The Witness: Elvis A. Warthen.

The Clerk: Spell your last name, please.

The Witness: W-a-r-t-h-e-n.

Direct examination

By Mr. Corn:

Q. Now, Sergeant Warthen, did you hear the defendant's statement that you advised him—words to the effect, "Go on, try to make a break for it and we will shoot you," or words to that effect?

A. Yes, sir.

Q. Did you ever make such a statement——

A. No, sir, I did not.

Q. —to him or anyone else?

A. No, sir.

Q. How long have you been on the force, Sergeant Warthen?

A. Approximately nine years.

Q. Sorry, will you speak up?

A. Approximately nine years.

Q. How old are you, Sergeant?

A. 38.

Q. You are married and you have a 17 year old son, I understand?

[fol. 228] A. Yes, sir.

Q. You have been on the force nine years?

A. Yes, sir.

Q. How many times did you use your gun in that nine years?

A. Twice.

Mr. Paonessa: Your Honor, this is immaterial, I think.

The Court: Yes. I think as far as using his gun, it is immaterial, suffice to say he denied it. Let us stop there.

Mr. Corn: May I have one other question, your Honor?

The Court: Yes.

By Mr. Corn:

Q. Along this line, with reference to an escape in which the officer was involved in which he behayed with—I think this should be before the bench.

The Court: All right.

(Whereupon a discussion was held at the bench between the Court and counsel, outside the hearing of the jury and not reported.)

By Mr. Corn:

Q. Now, Officer, were you at the—. You were present when the defendant, Diane Ker, was being dressed, were you not?

A. Yes, sir, I was.

[fol. 229] Q. You were in the bedroom with her?

A. Yes, sir.

Q. Tell me, before you went into the bedroom with her, did you speak to her husband?

A. Yes, sir.

Q. What did you tell her husband——

A. I——

Q. —with reference to her dressing?

A. I told her husband to come into the bedroom with her and myself while she dressed.

Q. And did you shut the door when you went in there?

A. I don't recall whether I did or not, I believe I did.

Q. You were the supervising investigating officer in this arrest?

A. That's correct.

Q. You were in charge of the crew?

A. That's correct.

Q. Why did you want the husband in there at that time?

A. From primarily for my own protection.

Q. What do you mean by that?

A. To allay any statements she might make regarding my activity in the bedroom, whether she was dressing.

[fol. 230] Q. Why did you take her into the bedroom to dress? Why did you insist upon going into the bedroom while she was dressing, Officer?

A. For several reasons.

Q. Was she under arrest at this time?

A. She was under arrest —

Q. Fine.

A. —on a charge of a felony and to protect herself from any damage from herself I wanted to be present, also in the event there might possibly be any weapon we overlooked, I didn't want her to be able to obtain them. Also, there were windows in the bedroom, she might also possibly leave through, I didn't want her to leave through windows or any other method.

Q. Were you fearful of the safety of your fellow officers and yourself if the defendant obtained a weapon in the bedroom?

A. That is correct.

Q. Now, what is the normal course of procedure when someone in your department, a narcotics investigating or arresting officer, is searching something in the presence of the defendant, and the defendant is not looking?

A. Well, in all cases where it is possible, we do have we have an arrested person, we have them in the immediate presence where they can observe our activities while we are searching.

[fol. 231] Q. And if they are not looking, do you call it to their attention?

A. Yes, sir, we do.

Q. Why do you do that?

A. Because we want them to be able to observe what we —what we do find, where we find it, we also want them to be able to be sure in their own mind we don't remove things of value that belong to them.

Q. In other words, you are protecting yourself again?

A. That's correct.

Q. And at any time during this procedure did anyone else beside yourself, the defendants, Diane Ker or George Ker, enter that bedroom while Diane was dressing?

A. No, sir, they did not.

Q. You were the only person in there?

A. The two defendants and myself were in the bedroom the entire time. That is the only persons who were in the bedroom.

Q. Where were the other officers?

A. They were, at the time we were in the bedroom, they were, I believe, all in the living room.

Q. Now, sir, did you go into the kitchen?

A. Yes, sir.

Q. Did you, in the kitchen, observe anything on the table [fol. 232] other than the two and a half pounds of Marijuana on the scale?

A. On the table there was a cup containing some coffee, there was a slice of toast and that was partially eaten, and I believe there was some silverware and possibly a butter dish.

Q. Was there a coffee pot any place?

A. Yes, sir.

Q. Where was the coffee pot?

A. There was a coffee pot sitting on the drainboard quite close to where the baby scales containing the Marijuana was.

Q. In other words, the Marijuana and the coffee pot were close by each other?

A. Yes, sir.

Q. Now, did you talk to Diane Ker about her going into the kitchen at any time?

A. I didn't talk to her about going into the kitchen. I talked to her about her being in the kitchen.

Q. Was this at the time of the arrest?

A. Shortly after the arrest, yes, sir.

Q. You talked to her about—let me ask you, what did she say to you about that?

A. First I asked her what was in the package. She [fol. 233] stated that she didn't know, said she had never seen the package and I advised her that being in possession, that it was—it was rather hard to overlook with her being in the kitchen. She stated she was sitting there drinking

coffee and eating toast, and she had not looked in that direction.

Q. She said she was in the kitchen sitting there, drinking coffee and eating toast and had not looked in the direction of the Marijuana?

A. I don't recall if she stated she was in the kitchen, she stated that she was sitting at the table drinking coffee and eating toast.

Q. Sitting at a table drinking coffee. You don't know whether she said, "in the kitchen" or not?

A. I don't recall, I don't believe she did.

Q. Was there any other table in the apartment with coffee and toast on it?

A. No, sir.

Q. Incidentally, did you place the handcuffs on the defendant or did Officer Berman do that?

A. I believe I placed the handcuffs on the defendant, Diane Ker.

Q. Why do you place handcuffs on defendants when you arrest them for felonies?

A. It's primarily because- departmental——

Mr. Paonessa: I think this is immaterial why he goes [fol. 234] through certain procedures.

Mr. Corn: This has been brought up by the defense itself, your Honor.

The Court: It is a little remote. I don't see how this is going to help the case.

Mr. Corn: It was brought up by the defense, obvious statement by the defendant of the time, in the manner, it implied a roughness and some sort of crudeness of the officer.

The Court: It is sufficient that is your normal procedure, to put handcuffs on?

The Witness: That's correct.

The Court: That is sufficient. Leave it there. Let us proceed.

By Mr. Corn:

Q. Now, sir, let me ask you this, let us go back a couple of hours before you made the arrest, before you entered the apartment.

Do you know Ronnie Murphy?

A. Yes, sir.

Q. Were you involved in an investigating one Ronnie Murphy?

A. Yes, sir.

Q. This was a narcotics investigation?

A. Yes, sir.

Q. And in the course of that investigation, did you follow Ronnie Murphy?

[fol. 235] Mr. Paonessa: I object to this line of questioning, your Honor. It does not appear to me that it is proper rebuttal.

Mr. Corn: All right, I will withdraw it and rephrase this one question, your Honor.

The Court: Very well.

By Mr. Corn:

Q. Did you see the defendant, George Ker, any place any time on any street or in any car before you entered that apartment?

A. Yes, sir.

Q. Where and when?

A. I don't recall the exact time. It would be sometime between 8:00 and 9:00 p.m. on the 27th day of—27th day of July, 1960.

Q. Between 8:00 and 9:00 p.m.?

A. Yes, sir.

Q. All right, would you tell us how you observed him?

A. It was at 46——

Q. Strike that. Where were you before you observed him?

A. Before I observed him?

Q. Yes.

A. I was in my own vehicle driving on Fairfax Avenue.

Q. Why did you go to that location?

[fol. 236] A. Because I believed that Ronnie Murphy was coming to that location.

Q. Fine, and so what location is this? What location is this, sir? Is this the Slauson and Fairfax Avenue intersection?

A. That is Fairfax between Slauson and Stocker.

Q. Believing Ronnie Murphy was coming there, you went to that intersection?

A. That's correct.

Q. Approximately what time did you arrive?

A. I would estimate approximately 9:00 o'clock, possibly earlier.

Q. Is this an intersection—are there houses or apartments around this intersection?

A. No, sir.

Q. Describe it.

A. Correction, at the intersection there is. The location I went to there was not.

Q. I see.

At the location you went to, describe this area.

A. Well, Slauson goes up over a knoll there, no buildings on either side of the street; there is an open area, I believe, there is a park back a ways from the street, and one area there.

Q. Did you park on Fairfax?

[fol. 237] A. Yes, sir.

Q. Where did you park on Fairfax?

A. It's about the top of the hill, approximately half-way between Slauson and Stocker.

Q. We have here a blackboard. Would you please draw a diagram of the intersection?

A. How do want it?

Q. Might be better to use paper. We don't intend to offer it, but counsel might. Can your Honor see it?

The Court: Push it over more this way. John, the other way. That is it, a little bit more so that the jury can see it. That is fine.

By Mr. Corn:

Q. Will you draw this intersection, sir?

A. Do you mean the area in there in general? Which intersection do you want?

Q. Fairfax and Slauson, then if you believe it judicious, draw a little more of the area.

Will you do it in a heavier—I think that is not going to come through. Use the crayon, if you will.

Which way is north? Which way is south, Officer? Now,

where were you parked, Officer? Did you park on that—in that area?

A. Yes, sir.

[fol. 238] Q. Was it around 9:00 o'clock?

A. Approximately, yes, sir.

Q. Where did you park? Draw a diagram of your automobile, where you parked. Draw this on there and indicate Stocker up there. Will you do that?

A. My vehicle was parked approximately that position, possibly a little farther back off the street.

Q. Off the street?

A. Yeah.

Q. How many feet is it from this intersection here to this intersection *or* yards or distance?

A. I would say approximately 2,000 feet.

Q. 2,000 feet approximately? Where were you parked, half-way up?

A Approximately half-way, yes, sir.

Q. And how long were you parked there before you saw the defendant?

A. I saw the defendant prior to my parking there.

Q. Will you tell us how you observed him?

A. I was going north on Fairfax and my vehicle—I observed the defendant, that is the defendant, George Ker, seated in an automobile approximately this location (indicating).

Q. Draw a diagram of his automobile, please.

In that location there facing south, right?

A. Facing south, yes, sir.

[fol. 239] Q. How far was he from this intersection?

A. Possibly 500 feet.

Q. 500 feet. Would you put in 500 feet, please?

Are there apartments on this corner, do you know?

A. I believe there is nothing on that corner, as I recall.

Q. What was there opposite this man's car, George Ker?

A. Open field.

Q. Open fields?

A. Yes, sir.

Q. What was there where you were parked?

A. Also open area.

Q. Is this the oil well area?

A. No, sir, I don't believe there is any oil wells in that

area. Our oil wells are north of Stocker, the entire area in there, oil fields.

Q. Are there any apartment houses around here, if you know?

A. Not on Slauson. I don't know.

Q. Let's say around 100 feet south, within 100 feet south of where the defendant's car was parked, were there any apartment houses?

A. No, sir, there were not.

Q. No apartment houses there. Was there 100 feet north [fol. 240] of it, apartments?

A. No, sir.

Q. Were there any cars parked on his side of the street, if you know?

A. There were other cars parked in the area. There was none closer than a hundred feet to his.

Q. None closer than a 100 feet to his?

A. No, sir.

Q. Now, when you passed him, did you see into the car?

A. Yes, sir.

Q. And where was the defendant, George Ker, sitting?

A. He was seated behind the wheel of the automobile.

Q. Was there anybody else in that car?

A. No, sir.

Q. What did you do then?

A. I drove north on Fairfax to the top of the hill to a point where I could observe both down the hill on both sides, and I parked there.

Q. What was your purpose of parking there?

A. Waiting till Ronald Murphy came to that location.

Q. Now, Officer, did you see Ronnie Murphy come to that location?

[fol. 241] The Court: You may resume the stand.

By Mr. Corn:

Q. You may resume the stand. Push that aside so the jurors can see, like a good fellow. Now, you may take the stand.

Did you finally see Ronnie Murphy come there?

A. Yes, sir, I did.

Q. Was he in a car?

A. Yes, sir.

Q. Which way was he driving?

A. He was driving north on Fairfax.

Q. What did you do then?

A. I attempted to follow him.

Q. Your primary concern, sole concern, at that time was Ronnie Murphy?

A. Yes, sir.

Q. Were you interested in George Ker at this time?

A. I had become interested in him in that he was parked there alone in that location.

Q. How long a period elapsed between your first arriving there and seeing Ronnie Murphy?

A. Approximately five minutes.

Q. Five minutes elapsed——

A. Yes, sir.

Q. —between the time you came there and the time that Ronnie Murphy arrived?

[fol. 242] A. Yes, sir.

Q. Now, sir, did you keep your—did you notice Mr. Ker in the car, that he was sitting in it all throughout those five minutes?

A. Yes, sir.

Q. Was he alone all throughout those five minutes?

A. Yes, sir.

Q. This was approximately still before 9:00 or 9:00 o'clock?

A. Yes, sir.

Q. Now, after Ronnie Murphy came, you say you gave pursuit to Ronnie Murphy?

A. I attempted to follow him.

Q. You were not pursuing him?

A. No, sir.

Q. You were tailing him?

A. That's correct.

Q. Did you lose Ronnie Murphy?

A. Yes, sir.

Q. Where did you lose him?

A. I followed him north on Fairfax across Stocker Avenue and into the oil fields and I had his car in sight approximately the equivalent of the city block.

Q. Did you go off in the oil fields on a dirt road or side [fol. 243] road?

A. Took the paved road and turned off his lights soon after he entered the oil fields.

Q. Turned his lights off when he entered the oil fields?

A. Yes, sir.

Q. Was it dark?

A. Yes, sir, it apparently was dark. I——

Q. So what did you do then?

A. After I lost him, I went back to the—approximately the same location I had parked before.

Q. Did you park in the same spot?

A. Approximately, yes, sir.

Q. And how long a period of time had elapsed between the time that you first saw Ronnie Murphy, tailed him, lost him in the oil fields and came back?

A. Possibly two minutes.

Q. Around two minutes?

A. Yes, sir.

Q. So, then, we have a period of seven minutes now between the time you first came there and saw George Ker and the time you are now back there, is that correct?

A. Yes, sir.

Q. Was George Ker still in the car?

A. Yes, sir.

[fol. 244] Q. Was he still alone in the car?

A. Yes, sir.

Q. Sitting behind the driver's wheel?

A. Yes, sir.

Q. Were his lights of his car on or off, by the way?

A. They were off.

Q. Then what happened then?

A. I remained in that—parked in that position until Ronald Murphy came back by heading south on Fairfax.

Q. About how much time elapsed between the time you had returned and you saw Ronald Murphy, the second time?

A. Approximately five minutes.

Q. So, now we have a period of 12 minutes between the time you first arrived, and you now seeing Ronald Murphy, is that correct?

A. Yes, sir.

Q. Was George Ker still in his car at that time?

A. Yes, sir.
Q. Still alone?
A. Yes, sir.
Q. Still seated behind the driver's wheel?
A. Yes, sir.
[fol. 245] Q. Incidentally, did you look inside to see whether or not there was anybody there?
A. Only what I could see by driving by.
Q. Did you see any baby in the car?
A. No, sir.
Q. Now, what did you see Ronnie Murphy do, if anything, and George Ker do, if anything?
A. George Ker remained in the vehicle, seated behind the wheel. Ronnie Murphy got out of his vehicle.
Q. What did he do with his vehicle moving down Fairfax, Officer?
A. Ronnie Murphy parked directly behind Mr. Ker's vehicle.
Q. About how many feet would you say behind? A car length?
A. It would be difficult to say, it wouldn't be more than a car length.
Q. Not more than a car length?
A. That's correct.
Q. Then what did you see happen, if anything?
A. Mr. Murphy got out of his car, walked up to the side of the vehicle Mr. Ker was seated in and remained there for possibly two minutes.
Q. Around two minutes at the side of the vehicle that Ker was in?
A. Yes, sir.
[fol. 246] Q. Could you see anything in Murphy's hands?
A. I didn't see anything in his hands, no, sir.
Q. You couldn't see anything. Was you vantage position so that you could see what was occurring?
A. I could see the persons, I don't—I don't believe I could have seen anything had they had it in their hands.
Q. If they had something in their hands?
A. I don't believe I could have.
Q. Why not?
A. Due to the distance and the fact it wasn't extremely light.

Q. But you did see—you did see Murphy get out of the car and go over to Ker's automobile?

A. I wasn't able to recognize him at that time. I did drive by the car and drove immediately by the two vehicles so that I could view the two persons and get the license number off the vehicle Mr. Ker was seated in.

Q. Now, you took the license number of Mr. Ker's vehicle?

A. Yes, sir, I did.

Q. And communicated that license number to whom?—Strike that.

Did you run a DMV check?

A. Yes, I did.

[fol. 247] Q. That is a Division of Motor Vehicle check——

A. Yes, sir.

Q. —to determine the name—in whose name the car in which he was sitting was registered to?

A. Yes, sir.

Q. Did you communicate that name was Mr. George Ker?

Mr. Paonessa: I object——

Mr. Corn: Strike that. Withdraw the question.

The Court: You may ask him what his investigation disclosed.

By Mr. Corn:

Q. What did your investigation disclose?

The Court: Your check disclose.

Mr. Paonessa: I object to what this investigation disclosed on the grounds it is hearsay.

Mr. Corn: I will withdraw the question, your Honor.

The Court: Very well.

Mr. Corn: I will withdraw the question.

Mr. Paonessa: You withdrew the question but it is still said. I don't think you should have made that statement.

The Court: What statement is that?

Mr. Paonessa: Well, the fact that, insinuating that this car was owned by George Ker.

[fol. 248] Mr. Corn: I ask for a recess at this time.

The Court: The answer will be stricken out.

Mr. Corn: If counsel wishes to oppose this over a recess——

The Court: Let us proceed.

Mr. Corn: I am protecting the recess.

The Court: There will be no recess. After you get through with the direct—or else we will lose our Court Reporter.

Mr. Corn: Thank you.

By Mr. Corn:

Q. Now, Officer, did you give the results of the investigation concerning the license number to any of your other officers?

A. Yes, sir, I did.

Q. Did you give it to Mr. Leo Berman seated to my right?

A. Yes, sir.

Q. Following that, did you have a conversation concerning Mr. George Ker?

A. Yes, sir.

Q. Immediately following that, did you go to Mr. Ker's apartment?

A. We went to the location of his apartment.

Q. Around an hour later, immediately following or—strike that—withdraw the question.

Immediately following your conversation with Mr. Berman, you went to Mr. Ker's apartment, is that correct?

[fol. 249] A. Yes, sir.

Q. Now, when you went to Mr. Ker's apartment, how long—what did you do?

A. First I went to the parking lot behind the apartment to ascertain if the vehicle was there that I had seen Mr. Murphy walk up to. The vehicle was there. I directed one of the officers to ascertain if there was somebody in the apartment. I don't recall which one of them went there. They came back and told me there was someone in the apartment. At that time I went to an office which was marked "Manager". I either knocked on the door bell or rang the door bell and contacted a person there who identified himself as the manager of the apartment. I advised him that I was going to enter the apartment number 29 because I had reason to believe there was a large quantity of Marijuana in the apartment, and asked if I may borrow

a key from him so that we would not have to knock the door down, gaining entrance. He stated that he wanted to call his attorney.

Q. You got a key after this?

A. Yes, sir.

The Court: You got the key, yes, go on, then. You went in the apartment?

Mr. Corn: No, sir, let me—may I ask him one or two other questions?

The Court: All right.

[fol. 250] By Mr. Corn:

Q. How long were you there before you entered the apartment?

A. The entire time would have been 15 to 20 minutes.

Q. Did you hear television going in the apartment?

A. I did not, I didn't go to the apartment.

Q. You went near the apartment—did you enter the apartment?

A. Yes, sir, I did.

Q. Were you the first person in the apartment?

A. Yes, sir.

Q. How did you enter that apartment?

A. I unlocked the door, opened the door and entered.

Q. You used the key?

A. Yes, sir.

Q. Did you make any thunder-like noises?

A. I didn't, I was very careful to be extremely quiet.

Q. Why would you be very careful as a narcotics investigating officer to be extremely quiet when you have a key in your hand entering a house in which you think there is a possibility of narcotics possession being committed?

A. Because on many, many occasions persons have [fol. 251] flushed narcotics down toilets, pushed them down drains and sinks and many other methods of getting rid of them prior to my entrance when I have made noises in the process of entering.

Q. In other words, you had the key in your hand and you wanted to be extremely quiet, in other words, to protect whatever evidence is in the apartment?

A. Yes, sir.

Mr. Corn: You may cross examine.

The Court: Well, we will take a seven minute recess now, and you remember my admonition about discussing this case, members of the jury.

(Whereupon the mid-morning recess was taken.)

Mr. Corn: Your Honor, may I be permitted to take one witness out of order?

The Court: Very well.

Mr. Corn: Mr. Markman.

MARVIN J. MARKMAN, called as a witness on behalf of the People, having been first duly sworn, resumed the stand and testified as follows:

The Clerk: You have been sworn.

Mr. Corn: Mr. Markman has not been sworn.

The Clerk: He has been.

[fol. 252] The Court: He has been sworn, but he went back. He has been sworn. He has been sworn. Let us go.

The Witness: Marvin——

Mr. Corn: Before I came out——

The Witness: Marvin J. Markman, M-a-r-k-m-a-n.

Direct examination

By Mr. Corn:

Q. Mr. Markman, you are a Los Angeles County Deputy Sheriff attached to the Narcotics Division?

A. That's correct, sir.

Q. Now, you were present in the—strike that.

You were one of the arresting officers on this case?

A. That's correct, sir.

Q. You were present during the arrest?

A. That's correct.

Q. Were you also with Sergeant Warthen in his automobile during the sequence of events that he has just testified about? At Slauson and Fairfax?

A. That's correct, sir.

Q. Did you see George Ker in his car?

A. That's correct, sir.

Q. Did you see anybody else in his car?

A. No, I did not.

Q. You were seated beside Officer Warthen during this [fol. 253] entire occurrence?

A. That's correct, sir.

Q. And was his testimony the same as your testimony would be?

A. That's correct, sir.

Q. In other words, you would not vary your testimony in any way?

A. No, with the exception of the exact times of arriving at the location and so forth.

Q. What about the amount of time you were there?

A. No, it was the exact amount of time as Sergeant Warthen testified to.

Q. What was the exact amount of time?

A. A. Well, we arrived at the corner, approximately 8:45 p.m. and placed the vehicle at the same area as Sergeant Warthen testified to, and we observed Mr. Murphy's vehicle drive up north on Fairfax and into the oil fields, remain there and then alight from the old fields; approximately 12 minutes elapsed between the time we first observed the defendant, Mr. Ker, in his vehicle and the time that we observed Mr. Murphy pull up behind the defendant's vehicle.

Q. And what time did elapse for this entire sequence in terms of minutes?

A. Approximately 15 minutes.

[fol. 254] Q. About 15 minutes?

A. Yes, sir.

Q. Now, you are sure you arrived there at 8:45 p.m.?

A. That's correct.

Q. Why are you so sure of that?

A. Because at 8:30, exactly 8:30 p.m. of that same evening Sergeant Warthen and myself followed Mr. Murphy's vehicle to 4339 West 102nd Street.

Q. Well, you were involved in a narcotics investigation?

A. That's correct, sir.

Q. As a matter of fact, in that course in investigations of this nature, you note time?

A. That's correct, sir.

Q. Just indicating the time. You take note of time because this is important to you?

A. That's correct, sir.

Q. Why is it important to you?

A. To establish any variance that might arise at a later date as to the time that we observe vehicles and leave vehicles and so forth.

Q. And did you also participate in the arrest?

A. The actual entry in the apartment I was not there, I placed myself in a position in the alley directly beneath the window of the defendants' apartment.

[fol. 255] Q. Why were you placed there?

A. That is a usual procedure in case evidence of any nature would be attempted to be disposed of by throwing it out the window.

Q. You'd be there to catch it?

A. That's correct.

Q. Now, did you hear the defendant—did you hear the officers enter the apartment?

A. No, I did not.

Q. Did you hear any loud thundering noises——

A. No, I did not.

Q. —when you got up there?

The Court: You have asked him if Mr. Warthen's testimony is the same. Let us not go over this same testimony.

Mr. Corn: No, there is one other point that has nothing to do with Mr. Warthen's testimony.

The Court: All right.

By Mr. Corn:

Q. How long was it between the time that they entered the apartment and you entered the apartment, if you know?

A. Approximately a minute, minute and a half, enough time to go upstairs.

Q. Were you called into the apartment?

A. Yes, I was.

Q. Did you see Officer Berman here in the apartment?

[fol. 256] A. As I entered the apartment all the officers and the defendants were in the kitchen.

Q. And did you hear Officer Berman say anything?

A. Yes, I did.

Q. What did you hear him say?

A. Deputy Berman was standing up and his statements were to my nearest recollection, "so that there will be no misunderstanding, we are narcotics officers conducting a narcotic investigation, and you are placed under arrest for violating—suspicion of violating State Narcotic Laws."

Mr. Corn: No further questions.

One final question, do you, of your own knowledge—personal knowledge, know, of the apartment situation in that intersection?

A. Yes, I do.

Q. Will you please describe it for the ladies and gentlemen of the jury?

The Court: Is it the same description as the other officer testified to?

Mr. Corn: If I recall, your Honor, the other officer didn't know the exact nature.

The Court: All right.

The Witness: Shall I leave the stand or——

The Court: Leave the stand, point, yes.

[fol. 257] Mr. Corn: If you want to use—if there are apartments there, would you draw them where they are. You can point it——

A. The corner of Slauson and Fairfax here is a florist shop; directly across the corner is a vacant lot and there are apartment—one string of apartment houses directly north of the parking lot. The defendant's vehicle was parked in a position where there were no apartments. The area was vacant on either side of the street. It was just north of the apartment house that was on Fairfax Avenue. It would be right here (indicating).

Q. Then, immediately across the street from the defendant's car was a vacant lot?

A. That's correct.

Q. Next to the defendant was a vacant lot?

A. That's correct.

Mr. Corn: Thank you, no further questions. You may cross examine.

Cross-examination

By Mr. Paonessa:

Q. Officer Markman, when you first observed the car you claim the defendant was riding in on this evening, how far were you from that car?

A. Where the defendant was sitting in the vehicle, not [fol. 258] riding. I observed him when he was sitting in the vehicle. He was not driving at that time.

Q. And this first occasion when you observed him, how far away were you from the place where you observed the defendant, or the person you claim to be the defendant?

A. When I first observed the defendant, we were driving, turning the corner on Fairfax and were directly across from him, going north on Fairfax Avenue.

Q. Approximately how far away was that in feet?

A. Across the intersection, I imagine it was anywhere between 25 and 30 feet.

Q. And approximately what length of time did you have occasion to observe him at this particular point?

A. At my first observing the defendant, it was approximately 8:45 p.m. that evening when we arrived at the location.

Q. Yes, that isn't what I asked. When you first observed the person you claim to be the defendant, how long did that observation continue?

A. Oh, I see. Approximately 30 seconds, the amount of time it took us to turn the corner and pass the vehicle.

Q. It was just a short glance then, this first observation of the person you claimed to be the defendant?

[fol. 259] A. Approximately 20 seconds.

Q. And when did you next observe the person you claimed to be the defendant?

A. As Sergeant Warthen parked the vehicle at the area which he said he parked the vehicle.

Q. And approximately how far was your vehicle, the vehicle in which you were seated, from the vehicle in which you claim the defendant was seated?

A. Oh, I would imagine—I am not too good at distance, approximately 1500 feet or 2,000 feet or something——

Q. Was the defendant—the car you claim the defendant was seated in in a well-lighted spot?

A. There was no direct lighting at all with the exception of the lights extending from the florist shop.

Q. What time of night did you say this was?

A. Approximately 8:45 when we first arrived there.

Q. And it was already rather dark at that time, was it not?

A. That's correct, sir.

Mr. Paonessa: No further questions.

The Court: Step down.

[fol. 260] Redirect examination

By Mr. Corn:

Q. One question. Did you have the headlights of your car on?

A. As we were turning the corner?

Q. Correct. Yes, did your headlights shine on Mr. Ker's car?

A. That's correct.

Q. Were other cars passing with headlights on in that area? In other words, was there light in that area from which you could see—afforded by headlights of other cars?

A. At one particular time throughout the entire surveillance there was.

Mr. Corn: Yes. Thank you.

The Court: All right, Mr. Markman.

Mr. Corn: May this preceding witness be excused?

The Court: Yes. You are excused, Mr. Markman. You may cross examine.

Elvis A. Warthen, recalled as a witness on behalf of the People, having been previously sworn, was examined and testified further as follows:

fendant's address was from Deputy Berman, wasn't it?

[fol. 261] The Witness: Elvis A. Warthen.

Cross-examination

By Mr. Paonessa:

Q. Officer Warthen, calling your attention first to the day after the defendants were arrested, and you were standing with the defendant, George Ker, in a hallway at the Lennox Police Station sometime that day, isn't that true?

A. I took him out of his cell back to the apartment for the purpose of searching his automobile. I don't recall standing in the hall with him.

Q. Then, do you recall a conversation with him as you were returning to the Lennox Police Station, do you not?

A. I don't recall any specific conversation with him.

Q. Was there another officer with you when you were escorting Mr. Ker back to the Lennox Station?

A. Yes, sir.

Q. Who was that officer?

A. Deputy Love.

Q. And isn't it true that while entering the Police Station, going through the hallway that one of you made a statement to Mr. Ker to the effect that he could run through that archway if he wanted to, make an attempt to escape?

[fol. 262] A. No, sir.

Q. Isn't it true that when one of you did make that statement that you had your hand—although your guns were in your holsters—that your hands were on the guns?

A. Rather difficult question to answer inasmuch as neither one of us made the statement.

Q. Do you know yourself you didn't make the statement?

A. I was in the immediate presence of the defendant Ker at all times and I didn't make the statement, and I know that Deputy Love did not make the statement because I was in a position that I could have heard him, had he made it.

Q. Now, drawing your attention to the evening of the arrests, when Mrs. Ker was getting dressed, the truth is that during all the time that Mrs. Ker was getting dressed, that Mr. Cook was—I mean Mr. Ker was being held by Deputy Cook out in the living room, isn't that true?

A. That is incorrect. Sergeant Cook was not at that location.

Q. I am sorry, I refer to Deputy Cook. I should have

said Deputy Love. Deputy Love was holding Mr. Ker handcuffed in the living room during the time that Mrs. [fol. 263] Ker was getting dressed, isn't that true?

A. That is not true.

Q. Now, ordinarily, when you arrest the female suspect, is it the proper procedure to call a matron to supervise that arrest?

A. No, sir.

Q. Isn't it proper to call a matron, well—on occasions when you have to search a female suspect?

A. That is correct, a matron was contacted and did make the search of the female.

Q. And isn't it true when a female is required to dress and put on different clothes than she is wearing that, a matron should be called to keep the female suspect in her observation while she is changing her clothes?

A. I can't say whether it's proper or not, counsel. It isn't policy.

Q. Are you not instructed by your superiors to always call a matron whenever there is a female suspect being arrested?

Mr. Corn: This has been asked and answered.

The Court: Yes. Objection sustained. It has been asked and answered.

By Mr. Paonessa:

Q. Well, the truth is that when Mrs. Ker was changing her clothes that you and Sergeant Berman and one of the other officers were present in her bedroom, and the defendant, George Ker, was not present, isn't that true?

[fol. 264] A. That is not true.

Q. The truth is that during all the time Mrs. Ker was changing her clothes, the defendant, George Ker, was handcuffed, isn't that true?

A. That is true.

Mr. Corn: If the Court please, might I interpose not an objection to strike, but the continuous use of the word "truth", as being argumentative. This witness is under oath.

The Court: You can say, "It is a fact". Proceed.

By Mr. Paonessa:

Q. Mr. Ker was handcuffed during the time Mrs. Ker was changing her clothes, wasn't he?

A. That is correct.

Q. And it's true that Deputy Love was questioning Mr. Ker while Mrs. Ker was changing her clothes, isn't that true?

A. That is not true.

Q. Now, directing your attention to the time immediately preceding this address, you claim you saw a vehicle in which it appeared that a person was seated who you believe to be the defendant; when did you first observe that car?

A. I didn't say I saw a vehicle that I believed the defendant was in, I said I saw a vehicle that I saw the defendant [fol. 265] was in. I first observed a car some time between 8:00 and 9:00 o'clock. I am not sure of the exact time.

Q. Where, when? Where was this vehicle when you first observed it?

A. When I first observed it, it was on Fairfax, I would say, estimate approximately 500 feet north of the intersection of Slauson and Fairfax on the west, parked on the west side on the dirt shoulder of Fairfax.

Q. And approximately how far were you from the vehicle when you first observed it?

A. Well, as I recall, a little bit north of the intersection of Fairfax and Slauson is a slight turn in Fairfax, and I believe I first observed him when I came around that turn.

Q. Approximately how far were you from the defendant's vehicle when you first observed it, I believe that was the question? In terms of feet?

A. I don't know, possibly 300 feet, possibly 100.

Q. And did you ever at any time draw closer to this vehicle?

A. Yes, sir.

Q. Approximately how far was the closest you ever came to the vehicle?

A. I passed it later at—I would estimate my car came [fol. 266] within three to four feet of the defendant's vehicle.

Q. Were you going in opposite directions?

A. He was parked, I was traveling.

Q. Was he parked at the left or the right side of the road?

A. He was parked on the right side of the road.

Q. And you were—you were driving a car, were you not?

A. That's correct.

Q. And at this time, along the place where the vehicle you observed was parked, was that a well-lighted place?

A. I don't recall what the lighting conditions were there at all. I do recall looking at the defendant and getting a good view of the defendant.

Q. Did you shine any light on the defendant as you passed by; in other words, to get a good view of him?

A. Not directly, not other than the headlights of our vehicle.

Q. In other words, you were driving your own vehicle, and as you passed the car that you claim the defendant was riding in, you glanced over in his direction?

A. I made it a point to look at him, yes, sir.

[fol. 267] Q. And how long did this observation continue?

A. I would guess it would be a matter of seconds.

Q. Did you look directly into the face of this person?

A. At that particular time, I don't recall just the direction he was looking. He was talking to Ronald Murphy and he was facing either directly toward the street or half-turned that direction, and I did get a fair view of his face at that time.

Q. You had never seen the defendant, George Ker, before that time, had you?

A. No, sir, I hadn't.

Q. You didn't recognize him at that time as a person who you had seen before, did you?

A. No, sir, I did not.

Q. What time of night was it when you passed this car?

A. I believe it was approximately 9:00 pm.

Q. Do you remember testifying in Court last Monday regarding this incident, this observation?

A. Yes, sir.

Q. And do you recall at that time you said that it was approximately 8:00 p.m.?

A. I believe I did, yes, sir.

Q. And, in fact, in response to one of my questions, you said that because it was 8:00 p.m. it was still rather light [fol. 268] with daylight, isn't that true?

A. I believe my reply was at that time I didn't recall whether or not it was light.

Q. Now, what time wa. it when you observed the car in which you claim defendant was? Was it 9:00 p.m. as you now say or 8:00 p.m.?

The Court: Just a moment, counsel. He says, "approximately 8:00 p.m." Approximately 8:00 p.m. may mean 7:00 to 9:00. Certainly, if a man says, "Approximately", he is entitled to an hour each way. His testimony is, "approximately 8:00 p.m.", not 8:00 or 9:00.

By Mr. Paonessa:

Q. All right, then, it was approximately 9:00 p.m. you are now saying you observed the car in which you claim the defendant was driving?

A. Yes, sir, I have since looked at some notes made that night and refreshed my memory. It was closer to 9:00 than it was to 8:00.

Q. And, in fact, it was rather dark at that time, was it not?

A. Yes, sir, it was dark.

Q. And then you proceeded to place, where you indicated on the board—to park your vehicle to keep the car you claim the defendant was in, in your observation, is that not [fol. 269] true? That was your testimony?

A. That was to keep him in my observation; also, to be in a position to observe Ronnie Murphy when he came to that location.

Q. Approximately how far was this point from the car in which you claim defendant was seated?

A. I would estimate 500 feet, possibly as much as a thousand feet.

Q. You just testified on direct examination that it was approximately 2,000 feet?

A. I testified that I would estimate approximately 2,000 feet from the intersection of Fairfax and Slauson to the intersection of Fairfax and Stocker, I believe was my testimony, counsel.

Q. Then, you were parked at the time you were keeping the car in which you claim defendant was seated in your observation, approximately a thousand feet away from it?

A. I said 500 to a thousand.

Q. All right.

And it was rather dark at that time?

A. Yes, sir. I had to utilize a good pair of binoculars, however.

Q. Did these—were these binoculars equipped with any facility for throwing a beam of light?

A. No, sir.

[fol. 270] Q. In fact, isn't it true that the reason you went to the defendant's apartment on that evening was because someone had told you if you went there you'd find a large quantity of marijuana, isn't that true?

A. No, sir, it is not.

Q. Did the name "Dwayne Krug" ring a bell with you?

A. I have heard it here in court today. I have never previously heard it.

Q. Haven't you had occasion to use him as an informer?

A. I never have, no, sir.

Q. To your knowledge, have any of your fellow officers used him as an informer?

A. Not to my knowledge.

Q. Well, in truth and in fact, you received the defendant's address from an anonymous source, did you not?

A. I received the defendant's address from the Department of Motor Vehicles, and also from Deputy Berman, that is, he confirmed the address.

Q. In other words, your first information as to the defendant's address was from Deputy Berman, wasn't it?

A. My first—

Q. That was your first information then after the arrest, [fol. 271] you checked with the Department of Motor Vehicles after the arrest, and after seeing the actual car owned by this defendant; then you checked to see if that car was actually registered to him, isn't that true?

A. I checked the license number on the vehicle the defendant was in with the Department of Motor Vehicles prior to discussing with Deputy Berman. The first time I ever heard the name George Ker was when someone from Motor

Vehicles said that vehicle was registered to George Ker. I believe they said George Douglas Ker, if I recall correct.

Q. I move it be stricken as hearsay, the information he received from the Department of Motor Vehicles. There is no record or certified record that the vehicle that the officer first saw was, in fact, registered through——

The Court: Objection will be overruled. Let us proceed. The answer may stand. It is not hearsay.

Let us proceed.

Mr. Paonessa: Yes, sir, I am trying to.

By Mr. Paonessa:

Q. Officer, now, when you arrived at the house of the defendants, the apartment of the defendants, you arrived there approximately an hour before they returned home, did you not?

A. No, sir, I did not.

[fol. 272] Q. Isn't it true that you went to the landlord and obtained the key and that for approximately an hour, maybe three-quarters of an hour, but for quite a length of time you remained on the front lawn with your fellow officers, is that not true?

A. No, sir, it is not true.

Q. When you first arrived at the defendant's apartment, did you have any knowledge that there was anybody inside that apartment, your own independent knowledge, that there was anybody inside that apartment?

A. When I first arrived, I did not.

Q. In fact, when you first arrived at that apartment, it was empty and there was no one inside of it, is that not true?

A. No, sir, it is not.

The Court: Mr. Paonessa, he answered that question twice and three times.

Mr. Paonessa: On direct examination. I am going over with him on cross examination.

The Court: You are insisting he went to that apartment before the defendants were home and he denied it twice now. Let us proceed.

By Mr. Paonessa:

Q. What was the license number of the vehicle you first observed and claimed Mr. Ker was riding in?

A. I don't recall.

[fol. 273] Q. Now, you claim that you observed the same vehicle at the defendant's apartment. What was the license number on that vehicle?

A. I don't recall.

Q. Now, when you were observing the defendant this evening—the person you claim to be the defendant—at Fairfax and Slauson, did you note what he was wearing?

A. No, sir, I didn't.

Q. Did you, as you passed by in the car, you say you were just relatively a few feet from him, did you note the color of his shirt?

A. No, sir. If I did, I don't recall at this time.

Mr. Paonessa: I have no further questions, your Honor.

The Court: Mr. Corn?

Redirect examination

By Mr. Corn:

Q. You told the defense counsel that you did not go there because someone told you that there was Marijuana in the apartment?

A. That's correct.

Q. Why did you go to the apartment?

A. Because I had seen the defendant with Mr. Ronnie Murphy who I knew to be dealing Marijuana in large [fol. 274] quantities.

The Court: I am not going to repeat his testimony, Mr. Corn.

Mr. Corn: This is not——

The Court: Yes, he went to the apartment.

Mr. Corn: May I approach the bench, your Honor?

The Court: Very well.

(Whereupon the following discussion was held between the Court and counsel, at the bench, outside the hearing of the jury.)

Mr. Corn: Your Honor, counsel has indicated this man went there because someone told him to go there, placed in the jury's mind by that question, your Honor, the indication of a plant. I have to rebut this inference of a plant.

The Court: But he denied it twice, three times.

Mr. Corn: He went there because of that, but should be entitled to explain why he went there.

The Court: He explained why he went to the apartment, because he talked to the fellows together.

Mr. Corn: But it indicates the inference there that Ker— this fellow might have made a plant and the inference logically is drawn from this question.

The Court: The defendant is implying——

Mr. Corn: Ronnie Murphy or the officers——

The Court: That is too far afield. I want to save time [fol. 275] approaching the bench. We are not saving time. You can't go over testimony, you can't go over testimony again.

Mr. Corn: No, he has never testified.

The Court: What are you asking now?

Mr. Corn: I am asking him, your Honor, that the question that he went there because Ronnie Murphy had been to that spot before and involved himself in a sale of narcotics at this spot, and if I'd recall Sergeant Cook and offer his testimony at this time——

The Court: You don't need that testimony. I think it is very clear that why——

Mr. Corn: To you, your Honor.

The Court: And I am not going to let him testify.

(Whereupon the following proceedings were held within the hearing of the jury.)

By Mr. Corn:

Q. When you entered the defendants' apartment, did you have any idea there would be a female inside in a semi-nude condition?

A. No, sir.

Q. And did you ever take a matron along with you on arrests?

A. No, sir.

Q. Now, did you at that time—oh, did you make a notation of the license number of the car that Mr. Ker was in?

[fol. 276] A. Yes, sir.

Q. Did you put that in the report?

A. Yes, sir.

Q. If you saw the report, would that refresh your recollection?

A. Yes, sir.

Q. Is this the report here?

(Whereupon Mr. Corn shows a document to the witness.)

A. Yes, sir.

Q. Is that the car?

A. Yes, sir.

Q. What is the year, model and license number?

Mr. Paonessa: I object to—

Mr. Corn: Strike that, your Honor.

Mr. Paonessa: The officer is using this to refresh his recollection. There is no indication he was the one to prepare it.

The Court: Lay the foundation. Did you prepare this?

By Mr. Corn:

Q. Did you prepare—

A. I assisted in the preparation of it.

The Court: That is sufficient.

By Mr. Corn:

Q. What was the make, model number and license?

[fol. 277] A. Vehicle is a '46 Dodge, two-door coupe, light tan in color, license FVJ-408.

Q. Now, then, you ran a DMV on that car?

A. Yes, sir.

Q. You went to Mr. Ker's apartment?

A. Yes, sir.

Q. When you went to that apartment, did you see this car, this 1946 Dodge there?

A. Yes, sir.

Q. Did you search that car—strike that.

What was the license number of the '46 Dodge at that apartment?

A. FVJ-408.

Q. The same one that you observed at the spot?

A. Yes, sir.

Q. Did you have any conversations with Mr. Ker about the ownership of that Dodge, if you can recall. If you can't——

A. Yes, I did.

Q. And what was that conversation?

A. I asked him if it was his car. He stated that it was.

Q. Oh, you have binoculars in your car at all times?

A. Yes, sir, I do.

Q. And do you use these binoculars in surveillance [fol. 278] investigations?

A. Yes, sir.

Mr. Corn: Thank you. No further questions.

Mr. Paonessa: No further questions.

The Court: You may step down. Do you rest, Mr. Corn?

Mr. Corn: No, your Honor, we have one further rebuttal witness.

The Court: Let us put him on.

Mr. Corn: Mr. Berman.

Leo Berman, recalled as a witness by and on behalf of the People, having been previously duly sworn, resumed the stand and testified further as follows:

The Clerk: State your name. You have been sworn, Mr. Berman.

The Witness: Leo Berman, B-e-r-m-a-n.

Direct examination

By Mr. Corn:

Q. Mr. Berman, you were one of the first people to go into the apartment, were you not?

A. That is correct.

Q. Did you use a key in getting into the apartment?

[fol. 279] A. We did.

Q. Did you use—make loud thundering noise?

A. We did not.

Q. You wished to be as quiet in getting into an apartment, do you not, where there is a possibility of narcotics being in the apartment?

A. That is correct.

Q. Now, when you entered the apartment, when did you identify yourself?

A. Immediately upon entering.

Q. And you identified yourself in what words?

The Court: I think he testified to that.

Mr. Corn: That is correct, your Honor. I withdraw the question.

The Court: All right.

By Mr. Corn:

Q. Oh, were you in the bedroom when the defendant was dressing herself?

A. I was not.

Q. Where were you?

A. I was in the kitchen. When they originally went into the bedroom, the defendant, both defendants and Sergeant Warthen, then I proceeded to the living room where I remained until they went to the bedroom.

Q. Were the other Deputy Sheriffs in the living room also with you at that time?

A. They were.

[fol. 280] Q. And the husband of the defendant, Diane, was in the bedroom with her when she was dressing?

A. That's correct.

Q. Did you ever tell Diane Ker, "Now, look at this", while you were uncovering something or, "I want you to watch this"?

A. I made the statements to both defendants throughout the investigation.

Q. What did you tell them?

A. My exact words I do not recall.

Q. Generally, what do you say?

A. "Watch us while we're looking at this particular spot", and so forth. We call their attention to it and if they don't look in our direction when we are checking an article, we reiterate the statement and do not continue the searching until they are watching what we are doing.

Q. You do, though, to protect yourselves and the identity of the thing you are searching, is that correct?
A. That is correct.

Mr. Corn: No further questions.
The Court: Any cross, Mr. Paonessa?

Cross-examination

By Mr. Paonessa:

Q. You were the person who first received information [fol. 281] that the apartment of Douglas Ker contained Marijuana, were you not?
A. Not that information.

The Court: There is no testimony that information was received.

By Mr. Paonessa:

Q. Where did you first receive your information that the apartment of Douglas Ker contained Marijuana?

Mr. Corn: Well, is there testimony when you went in that apartment—well, all right.
The Court: Do you have an objection?
Mr. Corn: I have no objection.
The Court: He may answer the question.
Mr. Corn: I wish to protect the defendant in something, coming out.
The Witness: I at no time received information stating directly that the apartment contained any Marijuana.

By Mr. Paonessa:

Q. Does the name Dwayne Krug mean anything to you?
A. It does.
Q. In fact, you have received information from him on occasions, have you not?
A. I refuse to answer that question.

Mr. Corn: People's privilege 1881.5.
The Court: Do you want the Court's permission so you [fol. 282] should not answer it?
The Witness: Yes.

The Court: You have that permission.

Mr. Paonessa: Then we can infer he has received information then?

Mr. Corn: Oh, your Honor, this is grossly improper.

The Court: Wait just a moment, Mr. Paonessa: Your comment is improper and the jury is instructed to disregard it. Proceed. You have a right to make that inference, if you wish it in your summation. You can make any inferences you wish.

Mr. Paonessa: Yes, in the summation.

The Court: All right.

By Mr. Paonessa:

Q. Wasn't it true that upon the occasion of defendants' arrest that evening, that you received some information from this Dwayne Krug as regarding possession of Marijuana within the apartment of the defendants?

The Court: I have already sustained the objection. He is not permitted to discuss Mr. Krug who may be an informer and he does not have to disclose his source of information.

Mr. Paonessa: Excuse me.

The Court: All right.

Mr. Corn: May I inquire of the Officer as to—may I approach the bench?

[fol. 283] The Court: You will have to have Mr. Paonessa come with you.

Mr. Paonessa?

(Whereupon there was a discussion at the bench between the Court and counsel, outside the hearing of the jury, which was not reported.)

(The following proceedings were held within the hearing of the jury.)

The Court: Let us proceed.

Are you through, Mr. Paonessa?

Mr. Paonessa: Yes.

Mr. Corn: Did you have——

The Court: Is there any question?

Mr. Corn: One question.

The Court: All right.

Redirect examination

By Mr. Corn:

Q. Did you have any information from other individuals concerning the defendant and possible narcotics?

A. I did.

Mr. Paonessa: I object to this, your Honor, on the grounds that it is immaterial to this case. The only—may we approach the bench?

[fol. 284] The Court: No, you have made your objection.

All right, I am going to sustain your objection. The jury are instructed to disregard it. Is there anything else?

Mr. Corn: No further questions.

The Court: What?

Mr. Corn: No further questions.

The Court: Do both of you rest?

Mr. Corn: Yes, we rest.

Mr. Paonessa: We will rest.

The Court: Members of the jury, I wonder if I would impose upon you if I asked you to get back at 20 after 1:00, which gives you an hour and 10 minutes for lunch. Do you think you can handle it without rushing? I will see you at 1:20. Will you gentlemen approach the bench?

(Whereupon there was a discussion between the Court and counsel at the bench, outside the hearing of the jury which was not reported.)

(Whereupon the noon recess was taken.)

[fol. 285] Santa Monica, California, October 26, 1960, 1:30 P.M.

(Whereupon both counsel made their arguments before the jury.)

(Whereupon the Court reads the instructions to the jury.)

The Court: Ladies and gentlemen, we will take a 10 minute recess. Remember my admonition about not discussing this case with anyone.

(Whereupon at 3:15 P.M. the mid-afternoon recess was taken.)

(Whereupon the Judge continues reading the instructions to the jury.)

The Court: Ladies and gentlemen, I am going to read the instructions to you, but I am not going to complete them so you will be able to go home tonight and then we will instruct you about coming back tomorrow morning.

(Whereupon the Judge continues reading the instructions to the jury.)

The Court: Ladies and gentlemen of the jury, the Court has not completed his instructions to you, therefore, you are not to discuss this case with anyone nor permit anyone to discuss the case with you. You are not to form any conclusions or opinions about this case until you retire to the [fol. 286] jury room tomorrow morning for deliberations. Report here at 9:45 A.M. tomorrow morning for your concluding instruction and you are not to resume deliberations until my instructions are completed which won't be until tomorrow morning. Good night and thank you.

(Whereupon at 3:30 P.M., the proceedings were adjourned for the day.)

[fol. 287] Santa Monica, California, October 27, 1960, 9:45 A.M.

The Court: Good morning.

(Whereupon the Court reads the last instruction to the jury.)

The Court: Mr. Clerk, swear the Bailiff.

(Whereupon the Clerk swears the Bailiff.)

(Whereupon the jury retires at 9:48 A.M. to deliberate the matter.)

(Whereupon at 11:13 A.M. the jury returns to the jury box.)

The Court: Who is the foreman, please? Mrs. Hendrickson?

Mrs. Hendrickson: Yes.

The Court: Have you arrived at a verdict?

Mrs. Hendrickson: We have, your Honor.

The Court: Hand the verdict to the Bailiff, please.

The Clerk: Title of Court and cause. "We, the jury in the above-entitled action find the defendant Diane K. Ker guilty of a violation of Section 11530 of the Health and Safety Code, a felony, as charged in the Information. It is not dated, your Honor.

The Court: We will get the date.

The Clerk: "This blank day of October, 1960, Edith M. Hendrickson."

[fol. 288] The Court: Will you give that to Mrs. Hendrickson, have her date it, please.

The Clerk: Neither one is dated.

The Court: Give it to them and have them date it.

The Clerk: Shall I read it again, your Honor?

The Court: Yes.

VERDICT

The Clerk: Title of Court and cause. "We, the jury in the above entitled action, find the defendant Diane K. Ker guilty of a violation of Section 11530 of the Health and Safety Code, a felony, as charged in the Information, this October 27, 1960, Edith M. Hendrickson, Foreman." Ladies and gentlemen of the jury, is this your verdict, so say you once, so say you all?

The Jury: Yes.

VERDICT

The Clerk: Title of Court and cause: "We, the jury in the above entitled action find the defendant George D. Ker guilty of a violation of Section 11530 of the Health and Safety Code, a felony, as charged in the Information, this 27th day of October, 1960, Mrs. Edith M. Hendrickson, Foreman." Ladies and gentlemen of the jury, is this your verdict, so say you once, so say you all?

The Jury: Yes.

The Court: Do you wish the jury polled?

Mr. Paonessa: No, your Honor.

[fol. 289] The Court: Very well. Ladies and gentlemen,

the Court wishes to express his personal thanks for your conscientiousness in discharging your obligation to your community.

The Clerk: Will it waive the reading of the verdict, counsel, as recorded?

Mr. Paonessa: Yes, your Honor.

The Court: All right.

Mr. Paonessa: We would like to say at this time we would ask leave to file our written application——

The Court: Yes, you can do it now. Go ahead.

Mr. Paonessa: With the Court's permission, at this time the defendants would like to request—waive time for sentencing and request permission to file a written application for probation.

The Court: Very well. How do you set those? Six weeks?

Mr. Corn: Five weeks, I understand, your Honor, six weeks, whatever the Court desires. I think five weeks would be enough. I am not too familiar with the exact time.

Mr. Paonessa: Well, can we get a date after the first of the year?

The Clerk: December 2nd would be five weeks.

The Court: Do you want it six weeks?

Mr. Paonessa: Six weeks would be more satisfactory.

[fol. 290] The Court: All right, give us the December 9 then.

The Clerk: December the 9th at 9:00 A.M., Department B.

Mr. Corn: Waiver of time?

Mr. Paonessa: Yes.

The Court: Get a personal waiver from the defendants, please.

Mr. Paonessa: Each of you waive your time for sentencing?

Diane Ker: Yes.

George Ker: Yes.

The Court: Audibly, so the Reporter can hear you.

Diane Ker: Yes.

George Ker: Yes.

The Court: Very well, the defendants will be—remain on bail. Any objection to that?

Mr. Corn: I will leave it to the discretion of the Court. I don't have any officers here.

The Court: What was your bail?

The Clerk: $1,000 each.

The Court: Well, in view of the fact ordinarily the bail should be increased, but in view of the fact both their parents are in the community and they are married and have a child, I think the Court will not be unwise permitting the defendants to stay out on the same bail. You are instructed to return here without further notice on De-

[fol. 291] cember 9.

The Clerk: Department D.

The Court: No, in Department A—D right here.

Mr. Paonessa: That is at 9:00 A.M.?

The Court: Is that the time we will hear the case, 9:00?

The Clerk: Yes.

The Court: 9:00 o'clock.

Mr. Corn: Thank you, your Honor.

The Court: All right.

(Whereupon the proceedings in this matter were adjourned.)

[fol. 292] Los Angeles, California, December 9, 1960, 9:00 A.M.

The Court: Ker.

SUBSTITUTION OF COUNSEL FOR DEFENDANTS

Mr. Stanley: Your Honor, I am Robert Stanley. Defendants, both of them, move at this time to substitute Al Matthews and Robert Stanley in this case, in the place and stead of Anthony Paonessa.

Mr. Paonessa: It is agreeable, your Honor.

The Court: Very well, substitution may be granted. These folks are up here for sentence.

Mr. Stanley: That is correct, your Honor.

I wish to state for the record, there is legal cause why they should not be sentenced at this time. Each defendant moves for a new trial in the case and we would request a week from today, your Honor, for the hearing on that. Actually, any day would otherwise be satisfactory, except Mr. Matthews and I are engaged in a murder trial in De-

partment 102 and Friday is the only day the Court over there is not in session.

The Court: Well, you have a situation here where these people were represented by counsel and the Court was ready to hear a motion for a new trial by Mr. Paonessa and I do not think this is grounds for continuance at this time. It is awfully late in the proceedings. The people are ready to be sentenced.

[fol. 293] Mr. Stanley: All right, the Defendants move for a new trial on all statutory grounds, your Honor.

The Court: Very well, your motion will be denied.

I am ready to sentence these people now and if there is no legal cause why judgment should not be pronounced and you won't waive arraignment, I will arraign them.

Mr. Stanley: We waive arraignment for judgment and sentence and there is no further legal cause why judgment should not be pronounced.

SENTENCE.

The Court: Very well.

Mr. Ker, the Court has given this matter a vast amount of thought. While I do not believe when one is sentenced he should be lectured to—and I am not going to engage in that—but as you know the crime of which you were convicted is a very pernicious one and in the Court's opinion it is people like you that are vastly responsible for the horrible practice that we have among younger children. I am thinking of your two year old daughter, and the Court is going to do everything in its power to see that this practice is minimized. You were represented by very able counsel but your defense was frivolous and in the Court's opinion, absurd. The Court has read and considered the Probation Report, and the Court will deny probation and sentence you to State Prison: and, Mrs. Ker, in your case I [fol. 294] have spent many sleepless hours about what to do with you. Both of you come from very fine families, both have fine parents, and considering the fact that you have a two year old child has given me a vast amount of uneasy hours: but I think your crime is so vicious and unforgivable and must be punished. The Court has read and con-

sidered the Probation Report and will give the following sentence:

I am only giving you this consideration—you may not think it's consideration but the Court does—because you are the mother of a two year old child. I am sending you to State Prison if you ever get in another difficulty, is that clear?

Mrs. Ker: (Nods head affirmatively.)

The Court: You are going to County Jail and the terms of five year probation are as follows:

Defendant will spend six (6) months in the County Jail. 1, 6, 7, 13, 14, 16, 18. The Defendant will not use or possess any narcotics, narcotic paraphernalia and stay away from places where addicts congregate. Defendant shall not associate with known narcotics users or sellers. Defendant will cooperate with the Probation Officer in a plan for psychiatric, psychological or other treatment. Defendant will seek and maintain employment as approved by the Probation Officer. Defendant will maintain residence as approved by the Probation Officer. Defendant will obey all [fol. 295] laws, orders, rules and regulations of the Probation Department.

Mrs. Ker, I have considered the fact that it means that you will be separated from your child during the Christmas holidays, but I say that in all earnestness and great humility, I don't think you deserve any consideration.

That will be all. Defendants will be remanded into the custody of the Marshal.

[fol. 296] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

Santa Monica "D" Hon. Benjamin Landis, Judge.

No. 231976

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

GEORGE D. KER, and DIANE K. KER, *Defendants.*

STATE OF CALIFORNIA,
County of Los Angeles, ss.

JUDGE'S CERTIFICATE

I, Benjamin Landis, Judge of the Superior Court of the State of California, in and for the County of Los Angeles, and being the Judge who presided at the trial in the above entitled criminal cause, do hereby certify that no objection has been made to the within transcript by either the defendant or his attorney, or the District Attorney within the time allowed by law; and the same is now, therefore, approved by me on this — day of ——, 1961.

——, Judge.

[fol. 297] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

Santa Monica "D" Hon. Benjamin Landis, Judge.

No. 231976

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

GEORGE D. KER, and DIANE K. KER, *Defendants.*

STATE OF CALIFORNIA,
County of Los Angeles.

JUDGE'S CERTIFICATE

I, Benjamin Landi Judge of the Superior Court of the State of California, in and for the County of Los Angeles, being the Judge who presided at the trial in the above entitled criminal cause, do hereby certify that the objections made to the transcript herein have been heard and determined, and the same is now corrected in accordance with such determination, within the time allowed by law; and the same is now, therefore, approved by me this — day of ——, 1961.

——, Judge.

[fols. 298-300] Clerk's and reporter's certificates to foregoing transcript omitted in printing.

[fols. 301-302] [File endorsement omitted.]

[fol. 303] IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE

No. 2nd CR 7541

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

vs.

GEORGE D. KER and DIANE K. KER, Defendants and Appellants.

Closing Brief of Appellants—Filed July 19, 1961

Before discussing the points which have been raised in the Reply Brief of the Respondents, we wish to bring to the attention of this Honorable Court certain decisions which have been handed down since the filing of the Opening Brief herein.

I

A MAN'S HOME IS HIS CASTLE AND THE INVASION THEREOF IS PROTECTED BY THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

When the decision in *People v. Cahan* (1955) 44 Cal. 2d 434 was handed down, it reversed the previous rule in California which held that evidence could be admitted regardless of how it was obtained and installed the Federal rule which held that evidence illegally obtained, or obtained in violation of the Constitutional rights of the defendant, was inadmissible. However, in rendering that decision, The [fol. 304] Supreme Court of the State of California stated: "... In developing a rule of evidence applicable to the state Court, this Court is not bound by the decisions that have applied the Federal rule, and if it appears that those decisions have developed needless refinements and distinctions, this Court need not follow them."

The quoted portion of the Cahan decision has now been overruled by the decision of *Mapp v. Ohio*, rendered by the United States Supreme Court on June 19, 1961, Case No. 236 in the October Term 1960, and reported in United

States Supreme Court Bulletin at page 2781. In a decision written by Justice Clark, it was held:

> "We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."

At page 2793 it is said:

> "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, this is enforceable against them by the same sanction of exclusion as is used against the Federal Government."

Thus, under the Mapp decision, we may test the facts in a State case by decisions of the Federal Courts against the agents of the Federal Government. If the evidence would not be admissible in Federal Courts, it may not be admitted [fol. 305] in State Courts.

In examining certain of the Federal decisions involving facts similar to those presented in the case at bar, it should be noted that:

(1). The officers broke into Appellants' home, at night, without warning, using a key secured from the landlord;

(2). The officers first searched and found marijuana and then arrested the Appellants;

(3). Previously that evening, the officers had observed a meeting between Appellant George Ker and Murphy (a known narcotic source), but had seen nothing pass between them;

(4). The officers had heard of Ker from various sources over a period of six months as selling marijuana from his home.

In *Johnson v. United States* (1947), 333 U. S. 10, 68 S. Ct. 367, officers smelled opium smoke emanating from a hotel room, knocked on the door, identified themselves to the defendant, entered and arrested the defendant. A subsequent search revealed opium. In holding that there was no reason why a search warrant could not have been first secured, the Court held: "Thus the Government is obliged to justify the arrest by the search and at the same time to justify the

search by the arrest. This will not do. An officer gaining access to private living quarters under color of his office [fol. 306] and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers and effects' and would obliterate one of the fundamental distinctions between our form of government, where officers are under the law, and the police-states where they are the law."

In *Agnello* v. *United States*, 269 U.S. 20, 46 S. Ct. 4, 70 L. Ed. 145, it was decided:

> "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are . . . unlawful notwithstanding facts unquestionably showing probable cause."

Chapman v. United States (1961) 81 S. Ct. 776, decided in April of this year, involved a landlord smelling the "odor of mash" coming from rented premises. He called state officers who entered through an unlocked window, found a still, called Federal officers, and arrested the defendant when he returned home. The Federal officers took him into custody, took evidence of the operation, and destroyed the still. In reversing the conviction the court said that "in any view, the action of the agents was inexcusable and the seizure unreasonable. The evidence was obtained unlawfully and should have been suppressed."

In *Taylor v. United States*, 286 U. S. 1, 52 S. Ct. 466, [fol. 307] 76 L. Ed. 951, the facts were similar to the case at bar. Federal agents had received information of activities at a garage. They smelled the odor of alcohol or whiskey coming from the garage. They looked through a small opening and saw a number of packing cases. Without warrant they broke in and found whiskey. While there the defendant came from his house to see what was going on and was placed under arrest. In reversing the conviction the Court held that there was no reason for failing to secure a search warrant and that surveillance would have prevented the removal of the evidence. "Prohibition officers may rely on a distinctive odor as a physical fact indicative

of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees . . . against unreasonable search."

The decision in *Silverman v. United States*, 81 S. Ct. 679, decided in March of 1961, Involved the use of a "spike mike" which penetrated a party wall and came in contact with the heating ducts of a house and enabled officers to listen in on all conversations in the house. The Court held:

> "The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."

There have been many decisions of the United States Court of Appeals which have held that an invasion of a man's home is a violation of the Fourth Amendment. In [fol. 308] the case of *Hobson v. United States* (1955) 8th Cir, 226 Fed. 2d 890, surveillance had been maintained on a woman for several years. With knowledge that she had been engaged in an illegal sale of narcotics, a month later officers went to her residence to arrest her. After knocking and identifying themselves at the door, her husband threw a package out the back window and an agent stationed there shouted the fact to the officer at the front, who in turn broke in and arrested the husband. At the time the intruding officers did not know the contents of the package, although later it proved to contain narcotics. In reversing the conviction of the husband, the Court held that a search warrant should have been procured.

In *Morrison v. United States*, 262 Fed. 2d 449, 104 U. S. App. D. C. 352, the Court held that an entry is lawful or unlawful at the time it is made, and a subsequent seizure has the same legal character as the entry which made the seizure possible.

The United States Courts are fairly unanimous in requiring that a search warrant be secured before searching a man's house, except where it is incident to an arrest, (*Agnello v. United States*, supra page 4,) and the rule and rationale of the Federal decisions are now applicable to searches made by state officers in state prosecutions under the authority of *Mapp v. Ohio*, supra page 2.

The California Supreme Court rendered a decision on [fol. 309] May 1, 1961, in *People v. Privett*, 55 A. C. 703, in which the Court reversed a conviction and held:

> "The sanctity of a private home is not only guaranteed by the Constitution of the United States and of our own state, but it is traditional in our Anglo-Saxon heritage. 'A man's home is his castle' is and should be more than an empty phrase . . . There was no emergency in this case which would have prevented the officers from seeking a warrant from a magistrate to enter this home."

In *People v. Keener*, 55 A. C. 719, also decided on May 1, 1961, held that "under the Fourth Amendment, even where there is probable cause, officers may not search a house without first obtaining a warrant, unless there are exceptional circumstances, such as danger that evidence will be removed or destroyed." (*Chapman v. United States*, 81 S. Ct. 776, supra, p. 4; *Johnson v. United States*, 333 U. S. 10, supra p. 3).

II

There Was No Probable Cause to Arrest Before Search, and No Reasonable Cause to Search Without Warrant

When the officers entered the apartment of Appellants' they first went to the kitchen and found the marijuana and then placed the defendants under arrest. This is the testimony of the officers. (Rep. Tr. p. 30). In other words they conducted a search before making an arrest. Let us see if [fol. 310] there were any facts which would make this justifiable under the cases.

Contrary to the testimony of one officer and the contention of the Respondent (Resp. Br. p. 17) apparently Ker did not drive North on La Brea, make a "U" turn and head South. Sgt. Warthern testified (Rp. Tr. p. 238) that Ker was parked on La Brea headed South and that Murphy caine by headed South and parked his car behind Ker's (Rp. Tr. p. 245). Therefore, it was not with knowledge that he was being followed that prompted Ker's driving away. If we were to assume that Respondent's contention was based on correct facts and that Ker headed North on La Brea, anyone familiar with the area would know that it is a consider-

able distance to the next intersection from Saluson and La Brea, when heading North on La Brea, and that to make a "U" turn would be the natural inclination if a person wanted to go back to Slauson. There is nothing in the facts to show that Ker had any knowledge that he was being followed, other than he made a "U" turn. Whichever officer is believed, there is nothing to indicate that Ker had any knowledge that he was being followed. Nor is there anything to show why the officer, if he were following Ker, did not also make a "U" turn and follow him.

Now, the transaction in which Ker is supposed to have had a part, differs materially from the transaction which took place the night before. In the first transaction, Murphy came to Terrhagen's car, took Terrhagen away, brought him back, Terrhagen got into his car and had a kilo of Marijuana—also Terrhagen was parked headed North, [fol. 311] whereas Ker was alleged to have been parked headed South.

The officers saw nothing in Murphy's hands when he went up to Ker's car (Rp. Tr. p. 246) and they saw nothing pass between them (Rp. Tr. p. 23, lines 4-6). As to lighting, the officer testified, p. 23, lines 24-26:

> "A. At this time I don't recall whether it was daylight or well-lit. I was able to see quite well, that I do recall."

Therefore, at the time they went to Appellants' house, they had no knowledge that a crime had been committed in their presence and no knowledge that Appellants, or either of them, were committing a crime. All the officers had was a suspicion gained from informants. That this suspicion was confirmed by the search was fortunate for the officers, but at the time the officers broke into the apartment, they had nothing but a suspicion and they did not have enough to justify an arrest until they had made a search.

As said in *People* v. *Privett*, 55 A.C. 703 (supra p. 7):

> "This court has held that an arrest without warrant can only be made if the facts known to the officers *before* making the arrest would justify the officers in making the arrest and that such an arrest cannot be

justified by what a search following the arrest turns up."

(*People v. Brown*, 45 Cal. 2d 640.)

[fol. 312] CONCLUSION

We sincerely believe that the judgment of conviction should be reversed and dismissal of the action directed.

Respectfully submitted, Matthews and Stanley, by Al Matthews, Attorneys for Appellants.

[fol. 313] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent,

vs.

GEORGE D. KER and DIANE K. KER, Petitioners.

Petition for Hearing

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Your Petitioners, George D. Ker and Diane K. Ker, respectfully petition for a hearing in this Honorable Court after a decision in the District Court of Appeal for the Second Appellate District affirming a judgment of conviction in the Superior Court of the County of Los Angeles, and denial of a petition for rehearing.

STATEMENT OF FACTS

The Petitioners were charged in an information filed by the District Attorney of the County of Los Angeles with the violation of Section 11530 of the Health & Safety Code of the State of California, to wit: possession of marijuana. Your Petitioners entered their pleas of not guilty and a trial before a jury was had, resulting in verdicts of guilty. [fol. 314] Thereafter the Petitioners were sentenced by the Honorable Benjamin Landis as follows: as to George D.

Ker, probation was denied and he was sentenced to the State Prison for the term prescribed by law; as to Diane K. Ker, she was sentenced to the California Institution for women, but sentence was suspended and she was placed on probation for the period of five years upon the usual conditions, one of which being that she spend the first six months in the County Jail. Thereafter, a timely notice of appeal was filed, execution of the sentences was stayed, and the Petitioners were released upon bail pending the determination of their appeals. Upon August 29, 1961, the District Court of Appeal, Second Appellate District, Division One, affirmed the convictions in an opinion written by the Honorable Justice Lillie. A petition for rehearing was filed and denied on September 20, 1961.

At the trial and out of the presence of the jury the Petitioners moved for a dismissal of the information under Section 995 of the Penal Code. After taking evidence on the issue of probable cause, and allied subjects, the court denied the motion and the trial was held.

Attached hereto as an appendix is the decision of the District Court of Appeal in this matter, to which reference will be made for the facts. However, certain facts which are believed to be vital to this proceeding will be emphasized.

Briefly an undercover officer of the Sheriff's Office made a purchase of marijuana which was taken from a kilo of [fol. 315] marijuana which was purchased near the intersection of Slauson and Fairfax Avenues in Los Angeles. The next night undercover officers, engaged in surveillance of the principal supplier of the marijuana, parked about a thousand feet from the same intersection. At that time he observed a car parked near where the officer had been parked the night before when the kilo of marijuana was delivered. He observed the supplier park behind the parked car, get out of his car, talk to the occupant of the parked car for two minutes, and then observed both cars leave. The officer followed the parked car until it made a U-turn and he lost it, but he secured the license number and a check revealed that the car was registered to the defendant George Ker. The officer testified that he was observing the meeting between Ker and the supplier through glasses. He testified as follows:

"Q. And what time of night was it that this took place when you observed Mr. Ker, Mr. Murphy approach this car you claimed Mr. Ker was in?

A. As I recall, it was about 8:00 o'clock.

Q. Was the place well-lighted, or was it pretty dark?

A. At this time I don't recall whether it was daylight or well-lit. I was able to see quite well, that I do recall. [fol. 316] Q. And did you actually see—I mean, I withdraw that, excuse me.

Did you actually recognize the person who was in the car that Mr. Murphy approached as the defendant sitting with me at the counsel table, Mr. Douglas Ker? Did you actually recognize that person at that time?

A. I didn't know Mr. Ker at that time. I observed him well enough to where I could identify him as the person seated next to you now."

(Rep. Tr. p. 23, line 18 to p. 24, line 9)

Just prior to this testimony, Sergeant Warthen had testified as follows:

"Q. Did you see anything pass between Mr. Murphy and Mr. Ker at that time?

A. No, sir.

Q. Did you hear any of the conversation between the two?

A. No, sir."

(Rep. Tr. p. 23, lines 4 to 9)

Another officer, Deputy Berman, that he had received information from various sources, commencing in November, 1959, and running to May of 1960, that Ker was dealing in narcotics from his home; that from May of 1960 to the arrest in July of 1960 he had received information on three or four occasions from one Black regarding Ker's activities [fol. 317] in marijuana. This Black took the stand for the defendants and testified that he was then serving time in the Sheriff's Honor Farm and that he had never told Berman of any narcotic activity by Ker, that he had known Ker for four or four and a half years and did not have any knowledge that Ker was engaged in the narcotic business.

The defendants sought to secure the names of the other informants from whom Officer Berman testified he had received information. The officer claimed the privilege of Section 1881.5 of the Code of Civil Procedure. The Court sustained objections as to any further questions regarding these informants and stated at p. 49, line 25 of the Reporter's Transcript:

> "The Court: I don't think its upon the—incumbent to furnish the name of the informers, and I don't think it would have any significance as far as their preparing the defense is concerned."

Officer Berman testified that he had no reliance or feeling about the reliability of Black but he did believe that his information was reliable because on three other occasions he made arrests based upon information from Black. However he does not state whether these arrests resulted in convictions. Officer Berman then testified:

> "Q. Now, pursuant to this information, did you then [fol. 318] go to Mr. Ker's apartment?
>
> A. That is correct.
>
> Q. Where was that located?
>
> A. At 41 or—correction—4801 West Slauson Avenue, Apartment 29, Los Angeles.
>
> Q. Tell us the circumstances of the arrest.
>
> A. We first received a—ascertained that the parties were home, both defendants were home. We then went to the manager of the apartment, identified ourselves, received a key to the apartment, unlocked the door of the apartment. As we entered the apartment, that was myself, Deputy Warthen and Deputy Love, I observed defendant George Ker to be seated on the couch. He stood up immediately. When I identified ourselves as Sheriff's Narcotics Officers and advised George Ker that we were *conducting a narcotics investigation*, at which time the defendant, Diane Ker, came from the kitchen of the apartment and I advised her of our identification, identified ourselves and advised her that we were *conducting a narcotics investigation*.
>
> I then proceeded to the kitchen where Mrs. Ker had just left, which Mrs. Ker had just left, and I observed

[fol. 319] a brown package that had a small tear in it, a square package, upon a small scale on the sink in the kitchen. This package contained a green, leafy substance which resembled Marijuana and weighed approximately two and two-tenths pounds.

. . . . . .

A. I then advised them that—the defendants that they were under arrest . . ." (Emphasis added)

(Rep. Tr. p. 28, line 19 to p. 30, line 9).

Later on, during the trial proper, Sergeant Warthen testified: (Rep. Tr. p. 270):

"Q. In fact, isn't it true that the reason you went to the defendants' apartment on that evening was because someone had told you if you went there you'd find a large quantity of marijuana, isn't that true?

A. No, sir, it is not."

And Deputy testified during the trial (Rep. Tr. p. 280, lines 26 to p. 281, line 18):

"Q. You were the person who first received information that the apartment of Douglas Ker contained marijuana, were you not?

A. Not that information.

The Court: There is no testimony that that informa-[fol. 320] tion was received.

Q. By Mr. Paonessa: Where did you first receive your information that the apartment of Douglas Ker contained marijuana?

The Witness: I at no time received information stating directly that the apartment contained any marijuana."

In addition to this kilo of marijuana, the officers found two other items of marijuana in the apartment. The next day the officers searched a car belonging to Diane Ker and found some more marijuana.

No admissions or confessions of the defendants were in-

troduced other than evidence of their silence when accused of the commission of crimes.

After the denial of the motion to dismiss under section 995 of the Penal Code, the trial proceeded. There was no evidence introduced by either the people or the defendants that they knew the marijuana was present in the apartment or car, or that either of the defendants had management and control over the marijuana, or that they knew that it was marijuana or had narcotic properties.

[fol. 321] GROUNDS FOR HEARING IN SUPREME COURT

This Petition for Hearing by the Supreme Court is based upon the ground that the hearing is necessary:

(1). To secure uniformity of decision; and
(2). To settle important questions of law.

CONTENTIONS OF PETITIONERS

Your Petitioners contend:

(1). That the motion under section 995 of the Penal Code should have been granted because:

(a). The evidence introduced by the People failed to show that the officers had reasonable cause to enter Petitioners' apartment and conduct a search;

(b). The evidence introduced by the People failed to show that the officers had probable cause to make the arrest;

(c). The evidence introduced by the People was secured by an illegal search and seizure in violation of Petitioners' Constitutional Rights under the California and United States Constitutions;

(d). The identity of informers was kept secret and unavailable to Petitioners by the witnesses for the People.

(2). The People failed to prove that the Petitioners had [fol. 322] dominion and control over the evidence seized, had knowledge of its presence, and had knowledge of its narcotic character.

(3). That the Petitioners were denied a fair trial and their conviction was a miscarriage of justice under Art. VI, section 4½ of the California Constitution.

(4). That Petitioners' conviction was a denial of due

process of law under the XIV Amendment of the United States Constitution.

Argument

After the filing of Petitioners' opening brief before the District Court of Appeal the decisions by this Honorable Court in *People v. Privett* (May 1, 1961) 55 A. C. 703 and *People v. Keener* (May 1, 1961) 55 A. C. 719 and the decision by the United States Supreme Court in *Mapp v. Ohio* (June 19, 1961) — U. S. 111, 6 L. Ed. 2d 1081, were handed down. It is Petitioners' belief and contention that these cases are controlling in this matter and require a reversal of the judgment of conviction and the mandate of this Honorable Court to dismiss the information.

I

The Constitutional Rights of the Petitioners Were Violated

In considering this point the following facts should be noted:

(1). The officers had neither a warrant to arrest the Petitioners or a warrant to search their apartment;
[fol. 323] (2). The officers ascertained that Petitioners were home and in the apartment;
(3). The officers secured a key to the apartment from the landlord and entered the apartment of the Petitioners without warning or advising Petitioners of their presence or without the consent of Petitioners;
(4). The officers identified themselves and stated that they were conducting a narcotics investigation;
(5). The officers then went into the kitchen, saw the marijuana, which could not be seen from the living room which they had first entered;
(6). The officers then placed Petitioners under arrest.

In *People v. Privett*, 55 A. C. 703, this Honorable Court reversed the conviction and stated:

> "The sanctity of a private home is not only guaranteed by the Constitution of the United States and of our own state, but it is traditional in our anglo-Saxon heritage. 'A man's home is his castle' is and should be more than an empty phrase."

In that decision this Court set up a parallel with the facts existing in *People v. Saunders*, 46 Cal. 2d 247 and your Petitioners submit that a similar parallel can be set up in this case to the same effect. In so doing we shall set up the [fol. 324] facts in this case first, those of *Privett* second, and those of *Saunders* third and shall paraphrase the words of this Court in *Privett*. Substitute information that Ker had been dealing in narcotics for record of burglary for record of bookmaking: substitute a meeting and conversation between Ker and a known narcotics supplier for conversation on the street with another man who also had a burglary record for the fact that another bookmaker had been on the premises the day before and "the parallel could hardly be closer."

In *People v. Keener*, 55 A. C. 719, this Court pointed out that "That the United States Supreme Court requires that 'under the Fourth Amendment, *even where there is probable cause*, officers may not search a house without first obtaining a warrant, unless there are exceptional circumstances, such as danger that evidence will be removed or destroyed'. (*Chapman v. United States*, 81 S. Ct. 776; *Johnson v. United States*, 333 U. S. 10, 68 S. Ct. 367)." (Emphasis added).

Then in the decision in *Mapp v. Ohio*, 81 S. Ct. 1684, it was held at p. 1691, by the United States Supreme Court that:

> "We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."
>
> "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is en- [fol. 325] forceable against them by the same sanction of exclusion as is used against the Federal Government."

Before the District Court of Appeal these decisions were presented in your Petitioners' Closing Brief. Leave of Court was secured to filing a supplemental brief by the Respondent and an additional reply brief by the Petitioners. Without any recognition being given to the decisions of this Court in *People v. Privett* (supra) or *People v. Keener*

(supra) the District Court of Appeal disposed of the decision in *Mapp v. Ohio* in the following words:

> "In the light of the implied findings of the trial court in its conclusion that probable cause existed, and the more than ample facts supporting the same; and the circumstances surrounding the entry, the finding of the marijuana and the subsequent search of defendant's apartment, the recent reference to *Mapp v. Ohio*, —— U.S. ——; 81 S. Ct. 111; 6 L. Ed. 2d 1081, does not justify a change in our original conclusion."

This statement would seem to indicate that the District Court of Appeal failed to grasp the significance of the facts of the case or of the decision in *Mapp v. Ohio*. The controlling point here is the entry into the apartment, what happened after that is immaterial. The officers' purpose in making that entry is clear from their own testimony—they entered, not to make an arrest, but to conduct a narcotics [fol. 326] investigation (supra p. 6). They did not place either defendant under arrest at that time. The officers first searched for the marijuana, albeit the first search involved merely going into the kitchen, yet to the officers in the living room there was nothing open to see, they had to go to the kitchen. This constituted a search and it was only after this search which revealed the marijuana that the officers placed the defendants under arrest. However, this search was after the entry and the question still remains whether the officers had the right to make the entry—in other words, were the constitutional rights of the petitioners violated by the entry of the officers. Not only will it be demonstrated hereinafter that the officers had no reasonable or probable cause to either search or arrest, but the rationale of the authorities is that the officers had no right to enter even though they had reasonable or probable cause.

In *Morrison v. United States*, 262 Fed. 2d 449, 104 U.S. App. D. C. 352 the Court held that an entry is lawful or unlawful at the time it is made, and a subsequent seizure has the same legal character as the entry which made the seizure possible. This is precisely the point involved here.

The principal contention of Petitioners finds strong back-

ing in the decision in *Agnello v. United States*, 269 U.S. 20, 46 S. Ct. 4, 70 L. Ed. 145 where the Court said:

> "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And [fol. 327] such searches are . . . unlawful notwithstanding facts unquestionably showing probable cause."

The case of *Johnson v. United States* (1947) 333 U.S. 10, 68 S. Ct. 367, presented the situation where officers smelled opium smoke emanating from a hotel room, they knocked and identified themselves, entered and arrested the defendant and a subsequent search revealed opium. In holding that a search warrant should have first been secured the court said:

> "Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do. An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine 'the right to the people to be secure in their persons, houses, papers and effects' and would obliterate one of the fundamental distinctions between our form of government, where officers are under the law, and the police-states where they are the law."

Chapman v. United States (1961) 81 S. Ct. 776, presented somewhat similar facts, where the odor of mash was smelled, officers entered through an unlocked window and found a still. In reversing the conviction the Court said:

> [fol. 328] ". . . in any view, the action of the agents was inexcusable and the seizure unreasonable. The evidence was obtained unlawfully and should have been suppressed."

In *Taylor v. United States*, 286 U.S. 1, 52 S. Ct. 466, 76 L. Ed. 951, where Federal officers had received information regarding activities at a garage and had smelled whiskey at the garage and observed packing cases, they broke in with-

out a warrant and found whiskey. In reversing the conviction the Court said:

> "Prohibition officers may rely on a distinct odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees . . . against unreasonable search."

The recent decision in *Silverman v. United States*, (1961) 81 S. Ct. 679, involving a "spike mike" which was inserted through a party wall, contacting a heating ducts and thus permitting officers to listen to conversations, produced this language by the Court:

> "The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."

The Petitioners submit that the entry of the officers to [fol. 329] Petitioners' apartment was illegal and improper and that the Constitutional rights of the Petitioners were violated.

II

The Officers had no Probable Cause

Even though Petitioners contend that the entry was illegal regardless of the existence of probable, they announced hereinbefore that they would demonstrate the lack of probable cause.

As said in *People v. Privett*, 55 A. C. 703:

> "This court has held that an arrest without warrant can only be made if the facts known to the officers *before* making the arrest would justify the officers in making the arrest and that such an arrest cannot be justified by what a search following the arrest turns up."

Citing: *People* v. *Brown*, 45 Cal. 2d 640.

In speaking of the search that was made in *Johnson v. United States*, (1947) 333 U. S. 10, 68 S. Ct. 367 (supra. p. 15), the Court said:

> "Since it was without warrant, it could be justified only if for a crime committed in the presence of the officers of which he has reasonable cause to believe defendant was guilty."

At the time of entry the facts which were available to the officers were:

[fol. 330] (1). Deputy Berman had received information over a period of six months, ending two months prior to the entry, that Ker was dealing in marijuana from his home;

(2). Deputy Berman had received information from Black on three or four occasions during the two months preceding the entry, of Ker's activities;

(3). Sergeant Warthen observed a meeting between Ker and a supplier on the night of the entry, but *observed nothing pass between them;*

(4). These various items of information were passed to the various officers including information that Berman had received a "mug shot" from the Inglewood Police Department several months before, but there is nothing in the record of any information of a crime committed by Ker and in fact no prior conviction was charged or proved.

(5). The night before the entry Sergeant Warthen had observed a meeting in which one Terrhagen had secured a kilo of marijuana and in turn sold a portion of it to an officer, this meeting being at the approximate location of the meeting with Ker.

This was what was known by the officers at the time of the entry. There is nothing to lead a reasonable person to believe that a crime had been committed in his presence or [fol. 331] that contraband was in Ker's possession or apartment. The District Court of Appeal deals with this situation as follows in its decision:

> "While the distance between Sergeant Warthen and Ker at Slauson and Fairfax prevented him from observing anything change hands between Ker and Murphy or hearing their conversation, it is a reasonable inference from what had occurred just prior thereto, the past repute, furtive conduct and activities of both Murphy and Ker, that Ker in the same fashion as Cook the night before had received from Murphy delivery

> of the same kind of merchandise (marijuana) and that Ker was returning with it to his home. Substantial circumstantial evidence destroys any merit to appellant's position that because the officers, by reason of distance and the time of night, observed nothing pass between Murphy and defendant, there existed no probable cause to believe he received marijuana and had it in his possession."

This quoted statement entirely disregards the actual facts—the officer did not say that because of distance and the time of night he did not see anything pass—what he did say was that he was observing through glasses, that it was quite light and he could see very well (supra p. 3). If he could see well enough to be able to identify the Petitioner, [fol. 332] Ker, he should have been able to see an object at least as big as half of a human's head. A kilo of marijuana, in brick form, is eight to ten inches in length; it is larger than an ordinary building brick. It was testified that one ounce of marijuana would yield from 40 to 60 cigarettes from which testify we can conclude that from 2.2 10 pounds, some 40,000 cigarettes can be secured.

Now, as defined by the Code of Civil Procedure, section 1958, an inference is a deduction which may be drawn from a fact proved. The District Court of Appeal would have us believe that it would be a reasonable inference that this kilo of marijuana had been delivered by Murphy to Ker. There is no fact from which such inference may be drawn. The true facts are to the contrary. The officer testified that he saw nothing pass—no ifs or ands or buts—no qualification of that statement in any wise—he did not see any marijuana pass between Murphy and Ker.

Therefore, there was no probable cause to believe that Ker was committing a felony at the time the entry was made by the officers. It was a fishing expedition, no more, no less, to see what they could find. The People now seek to justify that entry, the search and the arrest, as they must do when it is apparent that there was no warrant, and this they cannot do in this shoddy a manner. There is no legal reason giving the officers the right to enter the Petitioners' apartment without first securing a warrant.

[fol. 333]

III

THE IDENTITIES OF THE INFORMERS SHOULD HAVE BEEN REVEALED

If the officers relied on information from reformers over the six month period prior to the arrest, then the identity of these informers should have been revealed upon request by the petitioners. Particularly is this true when we consider that the one informer who was identified, Black, testified exactly contrary to the officer. That they did rely upon these informers is self-evident from the fact that this testimony was given on the issue of probable cause. Let us pose a supposition: suppose that there had been five other informants, in addition to Black; suppose that their identities had been revealed and the Petitioners had subpoenaed them into court; and suppose they had all testified in the same way as Black did; how much credence would a Court or jury give to the officers testimony?

Under the doctrine of *Priestly v. Superior Court*, 50 Cal. 2d 812, the names of these informants should have been revealed, rather than concealed behind the shield of section 1881.5 of the Code of Civil Procedure. That there was no motion to strike is clearly accounted for by the Court's attitude (supra p. 5). (*People v. Chatman*, 166 Cal. App. 2d 627).

IV

THE EVIDENCE WAS INSUFFICIENT TO PROVE KNOWLEDGE ON THE PART OF PETITIONERS

[fol. 334] It is well settled that in a prosecution for possession of narcotics, the prosecution must prove that;

(1). The forbidden substance was under the dominion and control of the accused;

(2). That the accused was aware of its presence;

(3). That the accused knew of the narcotic nature and character of the substance.

People v. Tabison, 166 Cal. App. 2d 271;
People v. Gory, 28 Cal. 2d 450;
People v. Bledsoe, 75 Cal. App. 2d 862;
People v. Cgndiotto, 128 Cal. App. 2d 347.

The burden is on the people to establish knowledge of the presence and narcotic nature of this substance:

People v. Winston, 46 Cal. 2d 151;

People v. Hernandez, 172 Cal. App. 3d 754.

The record is replete with testimony by the officers that the marijuana was in the apartment of Petitioners but this is not enough.

In the recent case of *People v. Born*, 187 A. C. A. 105, it was stated:

> "Knowledge of the narcotic nature of the object possessed constitutes an essential element of the crime of possession of narcotics, and the prosecution must establish that a defendant entertained such knowledge. (citing cases) Even if a defendant has not denied his knowledge of the narcotic nature of the substance in [fol. 335] his possession, the prosecution must still carry the burden on this issue."

The language in *People v. Bledsoe*, 75 Cal. App. 2d 862 is certainly persuasive here:

> "This is not, however, a case where the finding of the trial court is conclusive because of conflicting evidence, but it is one of a failure of the State to prove the essential elements of the crime . . . the evidence wholly fails to show appellant's knowledge 'of the presence' of the drug to justify a finding of 'knowledge' to satisfy the terms of the statute."

Particularly as to the Petitioner Diane Ker, there is no evidence whatsoever that she had ever had anything to do with marijuana or knew what it was. The only evidence against her is that the contraband was found in the house where she lived with her husband and baby and in her car which was parked in back, but had been unused. Aside from what has been previously discussed hereinbefore, the only other evidence against the Petitioner Douglas Ker is that several years before he admitted that he had smoked a marijuana cigarette partially. There is a lot of difference between marijuana in the bulk and that revealed in smoking a cigarette and knowledge of the one would not necessarily be knowledge of the other.

[fol. 336] So far as Mrs. Ker is concerned, she is no more than a bystander. In *People v. Antista*, 129 Cal. App. 2d 47, the Court said:

> "In all the cases we have examined in which conviction was upheld there was some incriminating circumstances in addition to the presence of marijuana or narcotic which indicated knowledge of the defendant of its presence and his control of it."

Under circumstances similar to those involved here, the convictions were reversed in *People v. Bledsoe*, supra p. 23, and *People v. Antista*, supra. In *People v. Gory*, 28 Cal. 2d 450, where marijuana was found in the defendant's foot locker at the Sheriff's Honor Rancho, it was held that the rejection of an instruction that the jury must find that defendant "knowingly had such objects in his possession" was reversible error.

There is no evidence whatsoever that the Petitioners had any knowledge of the presence of the marijuana or the character of the substance. In this regard the People failed to prove their case.

Conclusion

Petitioners submit that the matters shown herein are of sufficient importance to require consideration by this Honorable Court and that there should be a reversal of their conviction with a mandate to dismiss the information.

Respectfully submitted, Matthews and Stanley,
By Robert W. Stanley.

[fol. 337] IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE

Criminal No. 7541

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

vs.

GEORGE D. KER and DIANE K. KER, Defendants and Appellants.

Appeal from judgment of the Superior Court of Los Angeles County, and order denying motion for new trial. Benjamin Landis, Judge.

Matthews and Stanley for Appellants.

Stanley Mosk, Attorney General, and George W. Kell, Depaty Attorney General, for Respondent.

OPINION—FILED AUGUST 29, 1961

Defendants were charged with possession of marijuana in violation of Section 11530, Health & Safety Code. A motion for dismissal under Section 995, Penal Code, was denied; the following was offered on the issue of probable cause. Sergeant Cook, negotiating for the purchase of marijuana arranged to meet one Terrhagen around 7 P. M. on July 26, 1960. Terrhagen picked up Cook in his car and drove to a bowling alley which he entered; he returned in a few minutes and told Cook they were to meet the "con-[fol. 338] nection" by the oil fields near Slauson and Fairfax Avenues; Terrhagen then pointed out a parked 1946 DeSoto as the "connection's" car. They drove to Slauson and Fairfax where Cook again saw the 1946 DeSoto; Terrhagen told Cook the "connection" had his supply of narcotics somewhere in the hills. They parked in the vicinity near some vacant fields; the DeSoto proceeding ahead of them made a U-turn and pulled alongside. Cook identified the driver as Roland Murphy, whom he knew from "mug" photographs and police information to be a large-scale seller of marijuana then out on bail on two narcotic offenses. Terrhagen entered the DeSoto leaving Cook in the car;

they proceeded north on Fairfax over the hill and into the oil fields out of Cook's sight and returned fifteen minutes later. Murphy pulled up alongside the car in which Cook was waiting; Terrhagen entered carrying a kilo brick of marijuana. Murphy drove off northbound on Fairfax; Terrhagen drove home where he carved off of the kilo of marijuana a pound which Cook bought. Cook then relayed the foregoing information to Sergeant Warthen and Deputy Berman.

During all this time, Sergeant Warthen had Murphy under surveillance and observed the transaction with Cook; he also thereafter received from Cook direct information concerning it. The next day, July 27, 1960, Sergeant and Deputy Markman again took up surveillance of Murphy, starting at Murphy's home following him in his 1946 DeSoto to the same bowling alley. He remained there ten minutes, returned to the DeSoto and drove off; Sergeant Warthen [fol. 339] tried to follow but lost him; Warthen then drove to the Slauson-Fairfax location where he had staked out the evening before and observed Cook, Murphy and Terrhagen. Seated in his car with the lights off, parked near some vacant fields a short distance away, they saw defendant Ker, whom they did not then know. They were not then interested in Ker; their prime interest was Murphy whom they suspected to be a large-scale marijuana dealer and of whom they were conducting a narcotics investigation. Soon Murphy drove past in his DeSoto north on Fairfax; they tried to follow but lost him when he turned off his lights upon entering the oil fields. Shortly thereafter, Murphy returned, stopped behind Ker's automobile, got out, walked over to his car and appeared to talk to Ker. It was then between 8 and 9 P. M. Sergeant Warthen was about 1000 feet away and observed them through glasses; soon Ker drove away. Sergeant Warthen followed but lost him when he made a U-turn in the middle of the block; however he obtained the license number of the car and a check disclosed it was registered to Douglas Ker at 4801 Slauson. Fifteen minutes later, Sergeant Warthen communicated the foregoing to Deputy Berman.

Since November, 1959, Deputy Berman knew Ker as a narcotic suspect; he had received bits of information regarding him from "various persons"; he had been told Ker

was selling marijuana from his home and he was possibly securing it from Ronald Murphy, alias "Ronnie" Murphy; in early 1960, he received a "mug" picture of Ker from the Inglewood Police Department and until May, 1960, con- [fol. 340] tinued to receive various bits of information about him. Between May and July, 1960, Berman received information concerning Ker from one Black, a previous informant whose information Berman had used in other cases on at least three occasions resulting in arrests of two on forgery and one on narcotics and whose information Berman believed to be reliable; Black also supplied information to Berman relative to Murphy which had aided officers in their investigation of Murphy resulting in a complaint in the Federal Court which was then pending. Black had told Berman that Ker and others had bought quantities of marijuana from Murphy.

Acting upon the foregoing information and that relayed to him by Sergeants Cook and Warthen as hereinabove described, on July 27 between 9 and 10 P. M., shortly after Warthen had observed Murphy and Ker; Berman, Warthen and Deputy Love went to an apartment house at 4801 West Slauson Avenue; they first determined that Ker's car was parked behind the apartment house, ascertained that defendants lived in apartment 29 and were home, obtained a key from the manager so they would not have to break the door down, unlocked the door quietly so defendants would not hear their approach and attempt to destroy the evidence, and entered. The apartment had a kitchen, living room, bedroom and bath room. Ker was seated in the living room; they identified themselves and told him they were conducting a narcotics investigation; simultaneous therewith, Ker's wife, Diane, walked from the kitchen into the living room; Berman identified himself to her and immediately walked to the kitchen door without entering; standing in the door- [fol. 341] way Berman observed a small scale on top of the sink—on the scale was a brown paper package containing a 2-2 10ths pound brick of marijuana (Exhibit 1); near it was a knife.

Defendants called Robert J. Black, presently serving time in Mira Loma, as their witness. He testified he had known them 4½ years but denied knowing anything connecting them with the narcotic traffic, and denied he ever

made statements to that effect to Berman or any other police officer; he admitted having met Deputy Berman at the bowling alley.

The motion denied, the matter was tried before a jury. Evidence of Sergeant Warthen's surveillance of Murphy and Ker, and Berman's entry on the premises was presented to the jury. Continuing with his testimony, Deputy Berman, after walking to the kitchen door and seeing the marijuana on the scales said to defendants: "What is this," defendants answered they did not know; Berman said, "It appears to be marijuana to me. Is it yours?", defendants did not answer. Deputy Berman then arrested defendants and asked them "if they had any other narcotics or contraband in the apartment. They answered they did not. The officers then took defendants into the bedroom; there they saw a box containing ½ ounce of marijuana (Exhibit 2) atop a dresser; asked if it was theirs, defendants remained silent. Sergeant Warthen searched the kitchen and found in the cupboard a brown manila bag containing ½ ounce of marijuana (Exhibit 2); asked to whom it belonged, defendants remained silent. Warthen also saw in the kitchen [fol. 342] a cup containing coffee, a partially eaten slice of toast and some silverware on the table, and a coffee pot on the drainboard close to the marijuana on the scales. Mrs. Ker told Warthen that she had been sitting at the table in the kitchen drinking coffee and eating toast, but had not looked in the direction of the marijuana. Sergeant Warthen then asked the defendants if they owned any other auto than the one parked in the back and which they had seen Ker driving; Ker said they did not; Mrs. Ker remained silent. Berman had information Mrs. Ker owned a car; around noon the next day he went to the car which was registered in the name of Diane Ker, searched it and found marijuana seed under the rear seat and a bag containing marijuana (Exhibit 3) in the dashboard compartment.

In his defense, Ker testified that he and his wife left the apartment at 7:30 p. m. to look for a new apartment, and returned at 10:00 p. m.; that before leaving he received a call from an unknown person and that a kitchen window had been tampered with in their absence. He denied prior knowledge or possession of the 2-pound brick of marijuana (Exhibit 1); admitted ownership of the box (Exhibit 2) but

denied the marijuana in it was his; denied having met anyone during the period between 7:30 and 10:00 p.m., except Beswick whom they had visited; and admitted he knew Murphy but denied any rendezvous with him. Mrs. Ker corroborated her husband and denied prior knowledge of the marijuana (Exhibit 3) found in her automobile. Mr. Ker's [fol. 343] father and mother and Mrs. Ker's mother corroborated defendants' testimony relative to the "suspicious circumstances" of the telephone call and the tampering kitchen window. Beswick testified defendants visited him that night in his apartment. The theory of the defense was that while defendants were absent between 7:30 and 10:30 P. M. someone planted the marijuana in their apartment.

On rebuttal Sergeant Keith of the Glendale Police Department testified to a conversation with Ker in 1957, wherein the latter told him he had smoked marijuana several times but got "no kick out of it"; that Ker saw marijuana, which was identified as such, at that time.

In as much as the officers had no warrant, for the arrest or defendants to be valid the former must then have had reasonable cause to believe they had committed a felony. (Sec. 836(3), Penal Code; *People v. Bracamonte*, 194 A.C.A. 168). There being no formula for its determination, what constitutes "reasonable cause" depends upon the facts and circumstances of each case (*People v. Ingle*, 53 Cal. 2d 407; *People v. Wickliff*, 144 Cal. App. 2d 207; *People v. Hollins*, 173 Cal. App. 2d 88)—the situation presented or apparent to the officers at the time they were required to act. (*People v. Evans*, 175 Cal. App. 2d 274; *People v. Hollins*, 173 Cal. App. 2d 88; *People v. Silvestro*, 150 Cal. App. 2d 114; *People v. Carella*, 191 A.C.A. 110; *People v. Kilvington*, 104 Cal. 86; *People v. Murphy*, 173 Cal. App. 2d 367.) The weight to be accorded the information possessed by the [fol. 344] officers at the time they made the arrest is for the trial court in the exercise of its sound discretion. (*People v. Fisher*, 184 Cal. App. 2d 308; *People v. Taylor*, 176 Cal. App. 2d 46; *People v. Arter*, 169 Cal. App. 2d 439; *Lorenzen v. Superior Court*, 150 Cal. App. 2d 506). "Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused." (*Pompensiero v. Superior Court*, 44 Cal. 2d 178, 183; *People v.*

Fischer, 49 Cal. 2d 442; *People v. Ingle*, 53 Cal. 2d 407; *People v. Kilvington*, 104 Cal. 86.)

Deputy Berman, since November, 1959, knew of Ker from "various persons, bits of information," that Ker was possibly securing his marijuana from Murphy and selling it from his residence; since early 1960, Berman knew what Ker looked like, and continued to receive "various bits of information" up to May, 1960. From Black, a reliable informer, Berman, between May and July 27, 1960, received information concerning Ker's activities and trafficking of marijuana and that Ker had purchased from Murphy. The night before the arrest Berman learned that Murphy, known to him as a large-scale marijuana seller, then out on bail in connection with several marijuana offenses, kept his narcotic supply in the oil fields near Fairfax and Slauson; Berman knew of the rendezvous between Murphy, Terrhagen and Cook, Murphy's furtive conduct, the location and time of the meeting and that Murphy had sold Cook one pound of marijuana. Immediately prior to the arrest Berman learned that Murphy in his DeSoto went to the same [fol. 345] bowling alley, passed the same Slauson-Fairfax rendezvous where Ker was seated in his car at approximately the same location near the open fields at which Terrhagen and Cook had waited the night before, drove north on Fairfax into the oil fields in the same direction at about the same time of night, returned to Ker's car in the same fashion, left his automobile and talked to Ker. A check of the license number of the car Ker drove revealed his name and address. Immediately after ascertaining all of this information Berman and several officers proceeded to Ker's apartment where they arrested defendants with 2.2 10ths pounds of marijuana in their possession. Viewing the information in the possession of the officers at the time they entered the premises and arrested defendant, we deem the same to have afforded them sufficient ground for the belief that Ker had just secured marijuana from Murphy and had it in his possession.

While the distance between Sergeant Warthen and Ker at Slauson and Fairfax prevented him from observing anything change hands between Ker and Murphy or hearing their conversation, it is a reasonable inference from what had occurred just prior thereto, the past repute, furtive

conduct and activities of both Murphy and Ker, that Ker in the same fashion as Cook the night before had received from Murphy delivery of the same kind of merchandise (marijuana) and that Ker was returning with it to his home. Substantial evidence destroys any merit to appellants' position that because the officers, by reason of dis- [fol. 346] tance and the time of night, observed nothing pass between Murphy and defendant, there existed no probable cause to believe he received marijuana and had it in his possession.

In *People v. Tahtinen*, 30 Cal. 2d 127, the officers had prior information concerning the seller, Hernandes, but none concerning defendant. Hernandes, through the prior arrests of three persons, was known to the officers as a seller, doing business from his residence; officers saw defendant parked across the street from Hernandes' home, drive off, ride around and repark, walk into Hernandes' driveway, return to the alley, stop and appear to pick up an object at the base of a tree. They arrested him as he drove away and found heroin on his person and in his car. Defendant contended that the officer arrested him without reasonable cause to believe he had committed a felony; said the court: "This contention cannot be sustained. The information obtained from the three persons previously arrested gave the officers reasonable cause to believe the narcotics were being sold by Hernandes at his residence, and defendant's furtive conduct in the vicinity of Hernandes' house gave the officers reasonable cause to believe that defendant had purchased narcotics and had them in his possession." (p. 134). The case at bar is even stronger in that officers here had prior information concerning not only Murphy, the seller, but Ker the defendant.

While Diane Ker had not before been suspect, the evidence discloses something more than her "mere presence at [fol. 347] the scene of a crime." (Ans. B., p. 20). Deputy Berman knew from Black that Ker was selling marijuana at his residence; it could be assumed that if Ker was married, particularly in view of the size of the apartment in which they lived together, that his wife was not entirely without knowledge of his unlawful activities. But more important, her conduct when the officers entered the apartment and her admitted prior occupancy of the kitchen

wherein the marijuana was in plain sight made it obvious to the officers, even before they started their search, that she too was in the process of committing a felony (possession of Marijuana). When the officers walked into the living room, Diane walked from the kitchen where the marijuana lay on the scale in the middle of the drainboard; she said she had been sitting at the table drinking coffee and eating toast; the coffee pot was on the drainboard near the scale and marijuana. This lends little credit to her statement *that she did not look in that direction or know the contraband was there.*

Appellants say that the officers violated Section 844, Penal Code, in entering their apartment without first demanding admittance or explaining the purpose of their visit. Under circumstances such as those at bar, where police officers at a closed door have reason to believe that narcotics are to be had inside of the room and that if they do not enter quietly and or in haste the narcotics will be destroyed by the occupants, they act reasonably when in an effort to surprise them the officers either gain entrance by stealth or force their way in. (*People v. Ramsey*, 157 [fol. 348] Cal. App. 2d 178, *People v. Maddox*, 46 Cal. 2d 301; *People v. Ruiz*, 146 Cal. App. 2d 630; *People v. White*, 167 Cal. App. 2d 794.) No two situations are identical. Each depends, for determination of reasonableness, upon its own facts. (*People v. Williams*, 175 Cal. App. 2d 774.) Depaty Berman's knowledge of Ker's prior activities, his information that Ker was a seller out of his residence and his knowledge of Ker's conduct during the previous hour, that someone was then in the apartment and Ker's car was parked behind the building, were sufficient circumstances to justify the reasonable belief that it was Ker who was in the apartment and that he had then a considerable amount of marijuana in his possession, and that warned in advance of the arrival of police he would have attempted to destroy the same. Quick and quiet police action was warranted; to have announced themselves and or delayed entry, the officers would have provided Ker sufficient time within which to dispose of or destroy the narcotics. It was neither improper nor unreasonable for the officers to enter as they did.

Having had reasonable cause to believe Ker was in his apartment and had in his possession a substantial amount

of marijuana, the officers believing he committed and was committing a felony, entered the premises for the purpose of arresting Ker. As they entered the living room and identified themselves, Mrs. Ker simultaneously walked from the kitchen to the living room at which time Deputy Berman walked several steps to the kitchen door without entering [fol. 349] the kitchen. He saw in plain sight the marijuana on the scales. At this time no search had been made; Deputy Berman observed what was in plain view. (*People v. Roberts*, 182 Cal. App. 2d 431; *People v. Quinn*, 194 A.C.A. 173). The search of the apartment did not take place until defendants had been arrested; a search incidental to lawful arrest is not unlawful. (*People v. Winston*, 46 Cal. 2d 151; *People v. Montano*, 184 Cal. App. 2d 199; *People v. Quinn*, 194 A.C.A. 174.)

In the light of the inpried findings of the trial court in its conclusion that probable cause existed, and the more than ample facts supporting the same; and the circumstances surrounding the entry, the findings of the marijuana and the subsequent search of defendant's apartment, the recent reference to *Mapp v. Ohio*, — U.S. —, 81 S. Ct. 111, 6 L. Ed. 2d 1081, does not justify a change in our original conclusion.

Deputy Berman disclosed the identity of Black, but as to any other informants, the trial court permitted him to invoke the privilege of non-disclosure (Section 1881.5, Code of Civil Procedure). Thereafter, defendants made no motion to strike Berman's testimony, although they had ample opportunity to do so — after the officer invoked the privilege and before the issue was submitted, colloquy took place between the court and counsel, defendants put on Black as their witness and the motion was argued. "A defendant cannot raise the problem of nondisclosure in the appellate courts when he . . . did not move to strike the testimony on a refusal to disclose, (citations)." (*Priestly v. Superior* [fol. 350] *Court*, 50 Cal. 2d 812, 819.) Appellants argue they are excused from making the motion because it was *then* obvious from the trial court's statement that it would not have been granted. But the record does not bear this out; it shows that the trial court did not make the statement which "revealed its feeling about these informants" (A.O.B., p. 15) until long after the motion could and should have

been made, and after the issue of probable cause had been submitted. It was only then the court stated: "I don't think its upon the—incumbent to furnish the name of the informers and I don't think it would have any real significance as far as their preparing the defense is concerned."

Citing *Priestly v. Superior Court*, 50 Cal. 2d 812, appellants say the trial judge should have required Berman to reveal the names of other informers; we find no error here. The record discloses that the so-called "informants" referred to by appellants actually are the "various persons" who between November, 1959, and May, 1960, gave Berman "various bits of information" that Ker was suspect as selling marijuana he secured from Murphy, out of his home. Even appellants concede "that the officers did not state he was relying upon the information given by others from November, 1959, to May, 1960, in making the search and arrest." (A.O.B., p. 18); and, Berman testified he relied upon the information relayed to him by Sergeants Warthen and Cook, a "mug" picture from the Inglewood Police Department, and information given to him by Black whose full name he revealed. Both Warthen and Berman denied, [fol. 351] and the denial is nowhere controverted, that anyone had ever given them information that at the time of the arrest Ker had marijuana in his possession at his apartment. Nor does the testimony show that any of the "various persons" participated in the crime, were eyewitnesses non-participants, had anything to do with any of the events of July 26 or 27, were even in the vicinity or any of the locations at the times mention in the testimony, were present at the time and place of arrest, had ever pointed out Ker, his auto or his residence to the officers, or had even communicated with the officers since the first of May, 1960. Actually, the officers did not set out on July 27 to arrest Ker, they had no interest in him; their main concern was the "large-scale" seller, Murphy. They "stumbled" onto Ker in the process of their investigation of Murphy, and realizing, from what they knew of Murphy and had just seen occur between him and Ker, that Ker must have had a substantial amount of marijuana in his possession after leaving Murphy at Slauson and Fairfax, decided to arrest him before he was able to dispose of it. We fail to see under the circumstances hereinbefore described how the "bits of

information" obtained from "various persons" so long before the arrest could be "relevant and helpful to the defense of the accused or essential to a fair determination of a cause" (*People v. McShann*, 50 Cal. 2d 802, 808); nor can we see any purpose at all useful to the defendants had these persons been brought into court. (*People v. Williams*, 175 [fol. 352] Cal. App. 2d 774.) This situation does not fall within the purview of *Priestly v. Superior Court*, 50 Cal. 2d 813.

Appellants' final contention *does* to the sufficiency of the evidence to prove their dominion and control over the contraband and their knowledge of its presence and narcotic character. The case presents a direct conflict in the evidence. Defendants would have the jury believe they knew nothing about marijuana, that found in the apartment did not belong to them, they did not know it was there and someone must have planted it in their absence that night; but the jury, disbelieving the defendants and their witnesses, as it had the right to do, rejected their defense. (*People v. Stanciell*, 121 Cal. App. 2d 798.) Thus, viewing the evidence in a light most favorable to the respondent, we find numerous incriminating circumstances revealing that the defendants not only knew what marijuana was, but that the marijuana found in their apartment belonged to them.

We refer first to Ker. It is obvious that the officers had no intention of arresting Ker when they started their surveillance of Murphy on the evening of July 27; that it was Ker who met with Murphy was for the most part incidental to what the officers expected to find in an investigation of Murphy; and that Ker knew in advance, if not less the officers, that they would go to Ker's apartment between 9 and 10 p.m. to arrest him. Ker's association with Murphy only an hour before the former's arrest, his furtive meeting with Murphy at night in a fairly deserted location [fol. 353] where the night before Murphy had sold marijuana to Cook after a similar trip into the oil fields, and his conversation with Murphy in a parked car without lights at the side of the road, constituted substantial circumstantial evidence that Ker then and there obtained marijuana from Murphy and thereafter had it in his possession; and this coupled with the presence shortly thereafter of a two-pound brick of marijuana in his kitchen resting on a scale (on

which it obviously had been weighed after its purchase), can leave only one reasonable conclusion—that Ker secured the two-pound brick from Murphy and took it home to weigh it before disposing of it. And, finally, Ker definitely knew about marijuana before—he had admitted to officer Keith in 1957, in the presence of marijuana that had been identified as such, that he had smoked it; Ker had small amounts of marijuana in other places in his apartment—the officers found some in a box on the dresser in defendants' only bedroom and in a sack in the kitchen cupboard; Ker made no denial of possession—he remained silent in the face of the officer's questions in the apartment concerning to whom the marijuana belonged; Ker's answer to Berman's question assumed Ker knew the substance was marijuana and that it belonged to him—Berman after discovering the two-pound brick in the kitchen, asked him if he had "any other narcotics" in the apartment and Ker answered "that he did not"; Ker's lie to the officers when he denied that they owned any other vehicle than the one registered to him; and Ker's doubtful story on the stand [fol. 354] that the marijuana had been planted in his apartment. The circumstances pointing to Mrs. Ker's guilty knowledge are as revealing. Two and two-tenths pounds of marijuana, which would make a large number of cigarettes (Berman testified that one ounce of marijuana yields from 40 to 60 cigarettes), obviously were not for the Kers' own use, thus Ker, as the officers already knew, must have been peddling it from his apartment; it would be difficult to believe Diane Ker, as his wife, living with him in the small apartment, did not know of his unlawful activities therein and did not know the contraband was marijuana. According to her admission to the officers and their testimony, immediately prior to the officer's entry she had been occupying the kitchen and drinking coffee at the table in very close proximity to the marijuana on the scale in plain sight, in fact when the officers entered the living room she walked into it directly from the kitchen. Other circumstances relate to her silence when asked about other small amounts of marijuana found in her apartment, her silence when asked if she owned a car, the discovery of marijuana in two places in a car registered to her, and her ridiculous statement (although she drank coffee in the

kitchen and obviously poured it from a pot standing close to the marijuana on the scales) that she didn't look in that direction and did not know it was there.

On the issue of joint possession the court in *People v. Basco*, 121 Cal. App. 2d 794, stated, "A person may be so closely interested in and connected with the unlawful possession of narcotics by another as to furnish support for [fol. 355] a finding that there was a joint possession" (p. 796); and to show "knowing possession the conduct of the parties, admissions or contradictory statements and explanations are frequently sufficient. (citation)." (*People v. Foster*, 115 Cal. App. 2d 866, 868; *People v. Stancielt*, 121 Cal. App. 2d 798.)

It is clear that the evidence and the reasonable inferences therefrom support the implied finding of the jury that both defendants had knowledge of and a joint dominion and control over the contraband found in their apartment and were thus guilty of possession. (*People v. Bagley*, 133 Cal. App. 2d 481; *People v. Hood*, 150 Cal. App. 2d 497.)

For the foregoing reasons the judgment and order are affirmed.

Lillie, J.

We concur: Wood, P. J., Fourt, J.

[fol. 356] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 357] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

2nd District, Division 1, Crim. No. 7541

PEOPLE

v.

KER, ET AL.

ORDER DENYING HEARING AFTER JUDGMENT BY DISTRICT COURT OF APPEAL—FILED OCTOBER 25, 1961

Appellants' petition for hearing DENIED.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 358 SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1961

No. 617

GEORGE D. KER, ET AL., Petitioners,

vs.

CALIFORNIA

ORDER ALLOWING CERTIORARI.—January 22, 1962

The petition herein for a writ of certiorari to the District Court of Appeal of the State of California, Second Appellate District, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

January 22, 1962.

[fol. 359] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1961

No. 617

GEORGE D. KER, ET AL., Petitioners,

vs.

CALIFORNIA

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—April 16, 1962

On Consideration of the motion of the petitioner for leave to proceed further herein in forma pauperis,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 53

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

GEORGE D. KER and DIANE K. KER,
Defendants and Appellants.

PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

GEORGE D. KER and DIANE K. KER,

Defendants and Appellants.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The Petition of George D. Ker and Diane K. Ker for a writ of certiorari to review a judgment of the District Court of Appeal, Second Appellate District, State of California, made and entered by said court on the 29th day of August, 1961, a copy of which is hereto appended, respectfully shows to this honorable court:

Opinions of the Courts Below.

No opinion was rendered by the trial court.

The opinion of the District Court of Appeal, Second Appellate District, State of California, has been reported officially at 195 A. C. A. 290 and unofficially at 15 Cal. Rep. 767. A copy of the opinion rendered by said court is annexed to this petition as Appendix I.

No opinion was rendered by the Supreme Court of California. Hearing by said court was denied. A copy of the Order Denying Hearing after Judgment by District Court of Appeal is annexed to this petition as Appendix II.

Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked.

The date of the judgment sought to be reviewed and the date of its entry are the 29th day of August, 1961. On petition for hearing in the Supreme Court of the State of California an order denying hearing was filed the 22 day of November 1961.

There was no order respecting a rehearing. An order staying issuance of remittitur until *January 23,* 1961, was issued. Other than that there has been no order granting an extension of time within which to petition for certiorari.

The case is one involving the introduction in a State Court of evidence secured in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States.

The statutory provision believed to confer jurisdiction upon the court to review the judgment of the court below is United States Code, Title 28, Section 1257(3).

Questions Presented for Review.

I.

Where police officers, acting without a search warrant and without a warrant to arrest, and acting without reasonable or probable cause to search and arrest, enter an apartment of the accused by means of a key secured from the manager while the accused is present in the apartment, and without warning and without permission of accused, and there seize contraband, have the rights of the accused which are guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States been violated?

II.

May contraband secured by police officers in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States be introduced into evidence in a prosecution for the possession of that contraband in a State Court?

III.

Where police officers have received information over a period of six months that an accused is selling narcotics from his home, and where police officers observe a meeting between the accused and a known supplier of narcotics but do not see anything pass between the accused and the supplier, and where the officers have no information of the presence of narcotics in the home of the accused, do the officers have reasonable and probable cause to enter the home of the accused without permission, conduct a search and make an arrest for the possession of contraband discovered by such search?

Constitutional Provisions Which the Case Involves.

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

The Fourteenth Amendment to the Constitution of the United States provides:

> "Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person or life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added.)

Statement of the Case.

The Petitioners were charged in an information filed by the District Attorney of the County of Los Angeles, State of California, with the violation of Section 11530 of the Health & Safety Code of the State of California, to wit: possession of marijuana. After pleas of not guilty and at the commencement of trial the Petitioners moved under Section 995 of the Penal Code of the State of California, to set aside the information upon the ground that they had been com-

mitted without reasonable or probable cause. Evidence was taken on this point, out of the presence of the jury, and the motion was denied. Thereafter the trial was had and the Petitioners were found guilty; the husband, George D. Ker, was sentenced to the State prison and the wife, Diane K. Ker, was given probation, conditioned upon serving a period in the County Jail.

The record shows as follows:

(1) Police officers (Deputy Sheriffs of the County of Los Angeles) had received evidence from November, 1959, to May, 1960, from unidentified persons that George Ker was selling marijuana from his home and that he had probably purchased it from one Murphy.

(2) The officers received information on four or five occasions during the period of May, 1960, to the date of arrest in July, 1960, from one Black of George Ker's activities in marijuana. (This was categorically denied by Black when he took the stand for the defense.)

(3) The officers observed a meeting between Ker and Murphy at a point in the early evening where they had observed a fellow officer make a purchase from Murphy the night before. They did not know Ker but secured his address from his license plate. The spot was well lighted, sufficiently so that they could identify Ker in court. They did not observe anything pass between Murphy and Ker.

(4) A short time later that same evening the officers went to the address of Petitioners as revealed by a check with the Department of Motor Vehicles, ascertained that someone was home, secured a key from

the manager of the apartment, opened the door of Petitioners apartment quietly and without knocking and without permission.

(5) On entering the apartment George Ker was in the front room sitting down. The officers identified themselves and announced they were conducting a narcotics investigation. They similarly identified themselves to the Petitioner Diane Ker. The officers then looked in the kitchen and observed a "kilo brick" of marijuana on some scales. The officers then placed the Petitioners under arrest, conducted an additional search and found some loose marijuana.

(6) The following day Officers went back to the apartment and searched a car belonging to Diane Ker and found additional marijuana.

(7) The officers had neither a search warrant nor a warrant of arrest for Petitioners.

State of the Proceedings at Which and Manner in Which the Federal Question Sought to Be Reviewed Was Raised.

Objections were made in the trial court on the motion under 955 of the Penal Code, and at the trial, to the introduction of the evidence seized on the ground that the search and seizure and the arrest of Petitioners were illegal. During the pendency of the appeal in the District Court of Appeal and after the Petitioners had filed their opening brief, this Honorable Court rendered its decision in the case of *Mapp v. Ohio*, 367

U. S. 643 (81 S. Ct. 1684, 6 L. Ed. 2d 1081) on June 19, 1961. The Petitioners urged this matter as decisive of the appeal in their closing brief. The Attorney General sought leave to file a supplemental brief to dispose of that decision and Petitioners filed an answer to the supplemental brief again raising the Federal question. Upon decision of the District Court of Appeal a petition for hearing in the Supreme Court of the State of California was filed by Petitioners again raising the Federal question and supporting their petition with decisions of this Honorable Court and the Courts of Appeal. This petition was denied. These briefs are filed herein as part of the record.

The District Court of Appeal disposed of this question (Appendix I) in the following manner:

> "In the light of the implied findings of the trial court in its conclusion that probable cause existed, and the more than ample facts supporting the same; and the circumstances surrounding the entry, the finding of the marijuana and the subsequent search of defendants' apartment, the recent reference to *Mapp v. Ohio*, ... U. S. ..... ; 81 S. Ct. 111, 6 L. Ed. 2d 1081, does not justify a change in our original conclusion."

Arguments Relied for the Allowance of the Writ.

While this case is important to the Petitioners, in that George D. Ker will have to serve a term in the State Prison and Diane K. Ker will have to serve a term in the County Jail as well as serve a probationary term if the writ is not granted, yet there are matters involved which are more important. First: the protection of the rights of other citizens is involved, and, second, the obedience of the States to the mandates of this Honorable Court is involved.

In *Mapp v. Ohio, supra*, the facts were, if anything, more favorable to the officers there involved, than in the case at bar. In the former case the officers had information that a person wanted for questioning was hiding in a house and that various paraphernalia was located there. They went to the house, identified themselves and refused permission to enter. Some three hours later, supported by additional officers, and armed apparently with a simulated search warrant, they broke into the house and discovered the evidence which was introduced into evidence in a State trial over objection. In the case at bar the officers had no information that contraband was located in the Petitioners' apartment [Rep. Tr. p. 270; p. 280, line 26, to p. 281, line 18]; they saw nothing pass between Murphy and Ker [Rep. Tr. p. 23, lines 4-6]; they went to Petitioners' apartment, ascertained that someone was home, secured a key from the manager, and quietly opened the door of Petitioners' apartment; then the officers identified themselves and announced that "we were conducting a narcotics investigation" [Rep. Tr. p. 28, line 19, to p. 30, line 9]; the officers then looked in the kitchen and found the marijuana and then placed the Petitioners under arrest.

The decisions of this Honorable Court are reviewed in the decision of *Mapp v. Ohio, supra*, and are presented by the Honorable Justice Clark far better than might be done in this Petition. To be brief, that decision pointed out that the States had been given a chance to order their affairs to as to give effect to the decisions of this Court and held at page 1691 (81 S. Ct.) that:

> "We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."

The decision of this Court in *Agnello v. United States*, 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145, held:

> "Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are . . . unlawful notwithstanding facts unquestionably showing probable cause."

While the latter decision related to Federal officers, the reasoning there is now applicable to State officers through the *Mapp* decision. In the latter the Court pointed out that California had taken a step in the right direction in its decision in *People v. Cahan* (1955), 44 Cal. 2d 434, 282 P. 2d 905, 50 A. L. R. 2d 513, to protect the rights of accused persons.

Now the time has come to enforce the edict of the *Mapp* case and to require that the States give that decision more than lip service. In the words of the California Supreme Court in *People v. Privett*, (1960), 55 Cal. 2d 698, 12 Cal. Rep. 874:

> "'A man's home is his castle' is and should be more than an empty phrase."

Your Petitioners submit that their rights under the Fourth and Fourteenth Amendments to the Constitution of the United States and the evidence secured thereby should not have been admitted into evidence.

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of the State of California, to the end that the judgment of the District Court of Appeal, Second Appellate District of the State of California, may be reviewed and reversed by this Honorable Court.

MATTHEWS & STANLEY,

By AL MATTHEWS,

ROBERT W. STANLEY,

Attorneys for Appellants and Petitioners.

APPENDIX I.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division One.

The People of the State of California, Plaintiff and Respondent, vs. George D. Ker and Diane K. Ker, Defendants and Appellants. Criminal No. 7541.

Filed Aug. 29, 1961.

Appeal from judgment of the Superior Court of Los Angeles County, and order denying motion for new trial. Benjamin Landis, Judge.

Matthews and Stanley for Appellants.

Stanley Mosk, Attorney General, and George W. Kell, Deputy Attorney General, for Respondent.

Defendants were charged with possession of marijuana in violation of Section 11530, Health & Safety Code. A motion for dismissal under Section 995, Penal Code, was denied; the following was offered on the issue of probable cause. Sergeant Cook, negotiating for the purchase of marijuana arranged to meet one Terrhagen around 7 p.m. on July 26, 1960. Terrhagen picked up Cook in his car and drove to a bowling alley which he entered; he returned in a few minutes and told Cook they were to meet the "connection" by the oil fields near Slauson and Fairfax Avenues; Terrhagen then pointed out a parked 1946 DeSoto as the "connection's" car. They drove to Slauson and Fairfax where Cook again saw the 1946 DeSoto; Terr-

hagen told Cook the "connection" had his supply of narcotics somewhere in the hills. They parked in the vicinity near some vacant fields; the DeSoto proceeding ahead of them made a U-turn and pulled alongside. Cook identified the driver as Roland Murphy, whom he knew from "mug" photographs and police information to be a large-scale seller of marijuana then out on bail on two narcotic offenses. Terrhagen entered the DeSoto leaving Cook in the car; they proceeded north on Fairfax over the hill and into the oil fields out of Cook's sight and returned fifteen minutes later. Murphy pulled up alongside the car in which Cook was waiting; Terrhagen entered carrying a kilo brick of marijuana. Murphy drove off northbound on Fairfax; Terrhagen drove home where he carved off of the kilo of marijuana a pound which Cook bought. Cook then relayed the foregoing information to Sergeant Warthen and Deputy Berman.

During all this time, Sergeant Warthen had Murphy under surveillance and observed the transaction with Cook; he also thereafter received from Cook direct information concerning it. The next day, July 27, 1960, Sergeant Warthen and Deputy Markman again took up surveillance of Murphy, starting at Murphy's home, following him in his 1946 DeSoto to the same bowling alley. He remained there ten minutes, returned to the DeSoto and drove off; Segeant Warthen tried to follow but lost him; Warthen then drove to the Slauson-Fairfax location where he had staked out the evening before and observed Cook, Murphy and Terrhagen. Seated in his car with the lights off, parked near some vacant fields a short distance away, they saw defendant Ker, whom they did not then know. They were

not then interested in Ker; their prime interest was Murphy whom they suspected to be a large-scale marijuana seller and of whom they were conducting a narcotics investigation. Soon Murphy drove past in his DeSoto north on Fairfax; they tried to follow but lost him when he turned off his lights upon entering the oil fields. Shortly thereafter, Murphy returned, stopped behind Ker's automobile, got out, walked over to his car and appeared to talk to Ker. It was then between 8 and 9 p.m. Sergeant Warthen was about 1000 feet away and observed them through glasses; soon Ker drove away. Sergeant Warthen followed but lost him when he made a U-turn in the middle of the block; however he obtained the license number of the car and a check disclosed it was registered to Douglas Ker at 4801 Slauson. Fifteen minutes later, Sergeant Warthen communicated the foregoing to Deputy Berman.

Since November, 1959, Deputy Berman knew Ker as a narcotic suspect; he had received bits of information regarding him from "various persons"; he had been told Ker was selling marijuana from his home and he was possibly securing it from Ronald Murphy, alias "Ronnie" Murphy; in early 1960, he received a "mug" picture of Ker from the Inglewood Police Department and until May, 1960, continued to receive various bits of information about him. Between May and July, 1960, Berman received information concerning Ker from one Black, a previous informant whose information Berman had used in other cases on at least three occasions resulting in arrests of two on forgery and one on narcotics and whose information Berman believed to be reliable; Black also supplied information to Berman relative to Murphy which had aided

officers in their investigation of Murphy resulting in a complaint in the Federal Court which was then pending. Black had told Berman that Ker and others had bought quantities of marijuana from Murphy.

Acting upon the foregoing information and that relayed to him by Sergeants Cook and Warthen as hereinabove described, on July 27 between 9 and 10 p.m., shortly after Warthen had observed Murphy and Ker; Berman, Warthen and Deputy Love went to an apartment house at 4801 West Slauson Avenue; they first determined that Ker's car was parked behind the apartment house, ascertained that defendants lived in apartment 29 and were home, obtained a key from the manager so they would not have to break the door down, unlocked the door quietly so defedants would not hear their approach and attempt to destroy the evidence, and entered. The apartment had a kitchen, living room, bedroom and bath room. Ker was seated in the living room; they identified themselves and told him they were conducting a narcotics investigation; simultaneous therewith, Ker's wife, Diane, walked from the kitchen into the living room; Berman identified himself to her and immediately walked to the kitchen door without entering; standing in the doorway Berman observed a small scale on top of the sink—on the scale was a brown paper package containing a 2-2 10ths-pound brick of marijuana (Exhibit 1), near it was a knife.

Defendants called Robert J. Black, presently serving time in Mira Loma, as their witness. He testified he had known them 4½ years but denied knowing anything connecting them with the narcotic traffic, and denied he ever made statements to that effect to Berman or any other police officer; he admitted having met Deputy Berman at the bowling alley.

The motion denied, the matter was tried before a jury. Evidence of Sergeant Warthen's surveillance of Murphy and Ker, and Berman's entry on the premises was presented to the jury. Continuing with his testimony, Deputy Berman, after walking to the kitchen door and seeing the marijuana on the scales said to defendants: "What is this," defendants answered they did not know; Berman said, "It appears to be marijuana to me. It is yours?", defendants did not answer. Deputy Berman then arrested defendants and asked them "if they had any other narcotics or contraband in the apartment. They answered they did not." The officers then took defendants into the bedroom; there they saw a box containing ½ ounce of marijuana (Exhibit 2) atop a dresser; asked if it was theirs, defendants remained silent. Sergeant Warthen searched the kitchen and found in the cupboard a brown manilla bag containing ½ ounce of marijuana (Exhibit 2); asked to whom it belonged, defendants remained silent. Warthen also saw in the kitchen a cup containing coffee, a partially eaten slice of toast and some silverware on the table and a coffee pot on the drainboard close to the marijuana on the scales. Mrs. Ker told Warthen that she had been sitting at the table in the kitchen drinking coffee and eating toast, but had not looked in the direction of the marijuana. Sergeant Warthen then asked the defendants if they owned any other auto than the one parked in the back and which they had seen Ker driving; Ker said they did not; Mrs. Ker remained silent. Berman had information Mrs. Ker owned a car; around noon the next day he went to the car which was registered in the name of Diane Ker, searched it and found marijuana seed under the

rear seat and a bag containing marijuana (Exhibit 3) in the dashboard compartment.

In his defense, Ker testified that he and his wife left the apartment at 7:30 p.m. to look for a new apartment, and returned at 10:00 p.m.; that before leaving he received a call from an unknown person and that a kitchen window had been tampered with in their absence. He denied prior knowledge or possession of the 2-pound brick of marijuana (Exhibit 1); admitted ownership of the box (Exhibit 2) but denied the marijuana in it was his; denied having met anyone during the period between 7:30 and 10:00 p.m., except Beswick whom they had visited; and admitted he knew Murphy but denied any rendezvous with him. Mrs. Ker corroborated her husband and denied prior knowledge of the marijuana (Exhibit 3) found in her automobile. Mr. Ker's father and mother and Mrs. Ker's mother corroborated defendants' testimony relative to the "suspicious circumstances" of the telephone call and the tampered kitchen window. Beswick testified defendants visited him that night in his apartment. The theory of the defense was that while defendants were absent between 7:30 and 10:00 p.m. someone planted the marijuana in their apartment.

On rebuttal, Sergeant Keith of the Glendale Police Department testified to a conversation with Ker in 1957, wherein the latter told him he had smoked marijuana several times but got "no kick out of it"; that Ker saw marijuana, which was identified as such, at that time.

Inasmuch as the officers had no warrant for the arrest of defendants to be valid the former must then have had reasonable cause to believe they had commit-

ted a felony. (Sec. 836(3), Penal Code; People v. Bracamonte, 194 A.C.A. 108.) There being no formula for its determination, what constitutes "reasonable cause" depends upon the facts and circumstances of each case (People v. Ingle, 53 Cal. 2d 407; People v. Wickliff, 144 Cal. App. 2d 207; People v. Hollins, 173 Cal. App. 2d 88)—the situation presented or apparent to the officers at the time they were required to act. (People v. Evans, 175 Cal. App. 2d 274; People v. Hollins, 173 Cal. App. 2d 88; People v. Silvestri, 150 Cal. App. 2d 114; People v. Carella, 191 A.C.A. 110; People v. Kilvington, 104 Cal. 80; People v. Murphy, 173 Cal. App. 2d 367.) The weight to be accorded the information possessed by the officers at the time they made the arrest is for the trial court, in the exercise of its sound discretion. (People v. Fisher, 184 Cal. App. 2d 308; People v. Taylor, 176 Cal. App. 2d 46; People v. Arter, 169 Cal. App. 2d 439; Lorenzen v. Superior Court, 150 Cal. App. 2d 500.) "Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused." (Bompensiero v. Superior Court, 44 Cal. 2d 178, 183; People v. Fischer, 49 Cal. 2d 442; People v. Ingle, 53 Cal. 2d 407; People v. Kilvington, 104 Cal. 80.)

Deputy Berman, since November, 1959, knew of Ker from "various persons, bits of information," that Ker was possibly securing marijuana from Murphy and selling it from his residence; since early 1960, Berman knew what Ker looked like, and continued to receive "various bits of information" up to May, 1960. From Black, a reliable informer, Berman, between May and July 27, 1960, received information concerning Ker's

activities and trafficking of marijuana and that Ker had purchased from Murphy. The night before the arrest Berman learned that Murphy, known to him as a large-scale marijuana seller, then out on bail in connection with several marijuana offenses, kept his narcotic supply in the oil fields near Fairfax and Slauson; Berman knew of the rendezvous between Murphy, Terrhagen and Cook, Murphy's furtive conduct, the location and time of the meeting and that Murphy had sold Cook one pound of marijuana. Immediately prior to the arrest Berman learned that Murphy in his DeSoto went to the same bowling alley, passed the same Slauson-Fairfax rendezvous where Ker was seated in his car at approximately the same location near the open fields at which Terrhagen and Cook had waited the night before, drove north on Fairfax into the oil fields in the same direction at about the same time of night, returned to Ker's car in the same fashion, left his automobile and talked to Ker. A check of the license number of the car Ker drove revealed his name and address. Immediately after ascertaining all of this information Berman and several officers proceeded to Ker's apartment where they arrested defendants with 2-2 10ths pounds, of marijuana in their possession. Viewing the information in the possession of the officers at the time they entered the premises and arrested defendant, we deem the same to have afforded them sufficient ground for the belief that Ker had just secured marijuana from Murphy and had it in his possession.

While the distance between Sergeant Warthen and Ker at Slauson and Fairfax prevented him from observing anything change hands between Ker and Murphy or hearing their conversation, it is a reasonable in-

ference from what had occurred just prior thereto, the past repute, furtive conduct and activities of both Murphy and Ker, that Ker in the same fashion as Cook the night before had received from Murphy delivery of the same kind of merchandise (marijuana) and that Ker was returning with it to his home. Substantial circumstantial evidence destroys any merit to appellant's position that because the officers, by reason of distance and the time of night, observed nothing pass between Murphy and defendant, there existed no probable cause to believe he received marijuana and had it in his possession.

In People v. Tahtinen, 50 Cal. 2d 127, the officers had prior information concerning the seller, Hernandes, but none concerning defendant. Hernandes, through the prior arrests of three persons, was known to the officers as a seller, doing business from his residence; officers saw defendant parked across the street from Hernandes' home, drive off, ride around and repark, walk into Hernandes' driveway, return to the alley, stop and appear to pick up an object at the base of a tree. They arrested him as he drove away and found heroin on his person and in his car. Defendant contended that the officer arrested him without reasonable cause to believe he had committed a felony; said the court: "This contention cannot be sustained. The information obtained from the three persons previously arrested gave the officers reasonable cause to believe the narcotics were being sold by Hernandes at his residence, and defendant's furtive conduct in the vicinity of Hernandes' house gave the officers reasonable cause to believe that defendant had purchased narcotics and had them in his possession." (p. 134). The case at bar is even stronger in that officers here had prior

information concerning not only Murphy, the seller, but Ker the defendant.

While Diane Ker had not before been suspect, the evidence discloses something more than her "mere presence at the scene of a crime." (A.O.B., p. 20). Deputy Berman knew from Black that Ker was selling marijuana at his residence; it could be assumed that if Ker was married, particularly in view of the size of the apartment in which they lived together, that his wife was not entirely without knowledge of his unlawful activities. But more important, her conduct when the officers entered the apartment and her admitted prior occupancy of the kitchen wherein the marijuana was in plain sight made it obvious to the officers, even before they started their search, that she too was in the process of committing a felony (possession of marijuana). When the officers walked into the living room, Diane walked from the kitchen where the marijuana lay on the scale in the middle of the drainboard; she said she had been sitting at the table drinking coffee and eating toast; the coffee pot was on the drainboard very near the scale and marijuana. This lends little credit to her statement that she did not look in that direction or know the contraband was there.

Appellants say that the officers violated Section 844, Penal Code, in entering their apartment without first demanding admittance or explaining the purpose of their visit. Under circumstances such as those at bar, where police officers at a closed door have reason to believe that narcotics are to be had inside of the room and that if they do not enter quietly and/or in haste the narcotics will be destroyed by the occupants, they act reasonably when in an effort to surprise them the of-

ficers either gain entrance by stealth or force their way in. (People v Ramsey, 157 Cal. App. 2d 178, People v. Maddox, 46 Cal. 2d 301; People v. Ruiz, 140 Cal. App. 2d 630; People v. White, 167 Cal. App. 2d 794.) No two situations are identical. Each depends, for determination of reasonableness, upon its own facts. (People v. Williams, 175 Cal. App. 2d 774.) Deputy Berman's knowledge of Ker's prior activities, his information that Ker was a seller out of his residence and his knowledge of Ker's conduct during the previous hour, that someone was then in the apartment and Ker's car was parked behind the building, were sufficient circumstances to justify the reasonable belief that it was Ker who was in the apartment and that he had then a considerable amount of marijuana in his possession, and that warned in advance of the arrival of police he would have attempted to destroy the same. Quick and quiet police action was warranted; to have announced themselves and/or delayed entry, the officers would have provided Ker sufficient time within which to dispose of or destroy the narcotics. It was neither improper nor unreasonable for the officers to enter as they did.

Having had reasonable cause to believe Ker was in his apartment and had in his possession a substantial amount of marijuana, the officers believing he committed and was commiting a felony, entered the premises for the purpose of arresting Ker. As they entered the living room and identified themselves, Mrs. Ker simultaneously walked from the kitchen to the living room at which time Deputy Berman walked several steps to the kitchen door without entering the kitchen. He saw in plain sight the marijuana on the scales. At this time no search had been made; Deputy Berman ob-

served what was in plain view. (People v. Roberts, 182 Cal. App. 2d 431; People v. Quinn, 194 A.C.A. 173.) The search of the apartment did not take place until defendants had been arrested; a search incident to lawful arrest is not unlawful. (People v. Winston, 46 Cal. 2d 151; People v. Montano, 184 Cal. App. 2d 199; People v. Quinn, 194 A.C.A. 174.)

In the light of the implied findings of the trial court in its conclusion that probable cause existed, and the more than ample facts supporting the same; and the circumstances surrounding the entry, the finding of the marijuana and the subsequent search of defendant's apartment, the recent reference to Mapp v. Ohio, —— U. S. ——; 81 S. Ct. 111, 6 L. ed. 2d 1081, does not justify a change in our original conclusion.

Deputy Berman disclosed the identity of Black, but as to any other informants, the trial court permitted him to invoke the privilege of non-disclosure (Section 1881.5, Code of Civil Procedure). Thereafter, defendants made no motion to strike Berman's testimony, although they had ample opportunity to do so—after the officer invoked the privilege and before the issue was submitted, colloquy took place between the court and counsel, defendants put on Black as their witness and the motion was argued. "A defendant cannot raise the problem of nondisclosure in the appellate courts when he . . . did not move to strike the testimony on a refusal to disclose. (citations)." (Priestly v. Superior Court, 50 Cal. 2d 812, 819.) Appellants argue they are excused from making the motion because it was *then* obvious from the trial court's statement that it would not have been granted. But the record does not bear this out; it shows that the trial court did not make the statement which "revealed its feeling about

these informants" (A.O.B., p. 15) until long after the motion could and should have been made, and after the issue of probable cause had been submitted. It was only then the court stated: "I don't think its upon the—incumbent to furnish the name of the informers and I don't think it would have any real significance as far as their preparing the defense is concerned."

Citing Priestly v. Superior Court, 50 Cal. 2d 812, appellants say the trial judge should have required Berman to reveal the names of other informers; we find no error here. The record discloses that the so-called "informants" referred to by appellants actually are the "various persons" who between November, 1959, and May, 1960, gave Berman "various bits of information" that Ker was suspect of selling marijuana he secured from Murphy, out of his home. Even appellants concede "that the officer did not state he was relying upon the information given by others from November, 1959, to May, 1960, in making the search and arrest." (A.O.B., p. 18); and Berman testified he relied upon the information relayed to him by Sergeants Warthen and Cook, a "mug" picture from the Inglewood Police Department, and information given to him by a Black whose full name he revealed. Both Warthen and Berman denied, and the denial is nowhere controverted, that anyone had ever given them information that at the time of the arrest Ker had marijuana in his possession at his apartment. Nor does the testimony show that any of the "various persons" participated in the crime, were eyewitness non-participants, had anything to do with any of the events of July 26 or 27, were even in the vicinity or any of the locations at the times mentioned in the testimony, were present at the time and place of arrest, had ever pointed out Ker, his

auto or his residence to the officers, or had even communicated with the officers since the first of May, 1960. Actually, the officers did not set out on July 27 to arrest Ker, they had no interest in him; their main concern was the "large-scale" seller, Murphy. They "stumbled" onto Ker in the process of their investigation of Murphy, and realizing, from what they knew of Murphy and had just seen occur between him and Ker, that Ker must have had a substantial amount of marijuana in his possession after leaving Murphy at Slauson and Fairfax, decided to arrest him before he was able to dispose of it. We fail to see under the circumstances hereinbefore described how the "bits of information" obtained from "various persons" so long before the arrest could be "relevant and helpful to the defense of the accused or essential to a fair determination of a cause" (People v. McShann, 50 Cal. 2d 802, 808); nor can we see any purpose at all useful to the defendants had these persons been brought into court. (People v. Williams, 175 Cal. App. 2d 774.) This situation does not fall within the purview of Priestly v. Superior Court, 50 Cal. 2d 813.

Appellants' final contention goes to the sufficiency of the evidence to prove their dominion and control over the contraband and their knowledge of its presence and narcotic character. The case presents a direct conflict in the evidence. Defendants would have the jury believe they knew nothing about marijuana, that found in the apartment did not belong to them, they did not know it was there and someone must have planted it in their absence that night; but the jury, disbelieving the defendants and their witnesses, as it had a right to do, rejected their defense. (People v. Stanciell, 121 Cal. App. 2d 798.) Thus, viewing the evidence in a light

most favorable to the respondent, we find numerous incriminating circumstances revealing that the defendants not only knew what marijuana was but that the marijuana found in their apartment belonged to them.

We refer first to Ker. It is obvious that the officers had no intention of arresting Ker when they started their surviellance of Murphy on the evening of July 27; that it was Ker who met with Murphy was for the most part incidental to what the officers expected to find in an investigation of Murphy; and that no one knew in advance, much less the officers, that they would go to Ker's apartment between 9 and 10 p.m. to arrest him. Ker's association with Murphy only an hour before the former's arrest, his furtive meeting with Murphy at night in a fairly deserted location where the night before Murphy had sold marijuana to Cook after a similar trip into the oil fields, and his conversation with Murphy in a parked car without lights at the side of the road, constituted substantial circumstantial evidence that Ker then and there obtained marijuana from Murphy and thereafter had it in his possession; and this coupled with the presence shortly thereafter of a two-pound brick of marijuana in his kitchen resting on a scale (on which it obviously had been weighed after its purchase), can leave only one reasonable conclusion—that Ker secured the two-pound brick from Murphy and took it home to weigh it before disposing of it. And finally, Ker definitely knew about marijuana before—he had admitted to officer Keith in 1957, in the presence of marijuana that had been identified as such, that he had smoked it; Ker had small amounts of marijuana in other places in his apartment—the officers found some in a box on the dresser in defendants' only bedroom and in a sack in

the kitchen cupboard; Ker made no denial of possession —he remained silent in the face of the officer's questions in the apartment concerning to whom the marijuana belonged; Ker's answer to Berman's question assumed Ker knew the substance was marijuana and that it belonged to him—Berman after discovering the two-pound brick in the kitchen, asked him if he had "any other narcotics" in the apartment and Ker answered "that he did not"; Ker's lie to the officers when he denied that they owned any other vehicle than the one registered to him; and Ker's doubtful story on the stand that the marijuana had been planted in his apartment. The circumstances pointing to Mrs. Ker's guilty knowledge are as revealing. Two and two-tenths pounds of marijuana, which would make a large number of cigarettes (Berman testified that one ounce of marijuana yields from 40 to 60 cigarettes), obviously were not for the Kers' own use, thus Ker, as the officers already knew, must have been peddling it from his apartment; it would be difficult to believe Diane Ker, as his wife, living with him in the small apartment, did not know of his unlawful activities therein and did not know the contraband was marijuana. According to her admission to the officers and their testimony, immediately prior to the officers' entry, she had been occupying the kitchen and drinking coffee at the table in very close proximity to the marijuana on the scale in plain sight, in fact when the officers entered the living room she walked into it directly from the kitchen. Other circumstances relate to her silence when asked about other small amounts of marijuana found in her apartment, her silence when asked if she owned a car, the discovery of marijuana in two places in a car registered to her, and her ridiculous statement (although she drank

coffee in the kitchen and obviously poured it from a pot standing close to the marijuana on the scales) that she didn't look in that direction and did not know it was there.

On the issue of joint possession the court in People v. Basco, 121 Cal. App. 2d 794, stated: "A person may be so closely interested in and connected with the unlawful possession of narcotics by another as to furnish support for a finding that there was a joint possession" (p. 796); and to show "knowing possession the conduct of the parties, admissions or contradictory statements and explanations are frequently sufficient. (citations)." (People v. Foster, 115 Cal. App. 2d 806, 808; People v. Stancielf, 121 Cal. App. 2d 798.)

"It is clear that the evidence and the reasonable inferences therefrom support the implied finding of the jury that both defendants had knowledge of and a joint dominion and control over the contraband found in their apartment and were thus guilty of possession (People v. Bagley, 133 Cal. App. 2d 481; People v. Hood, 150 Cal. App. 2d 197.)

For the foregoing reasons the judgment and order are affirmed.

Lillie, *J.*

We concur:

Wood, *P. J.*

Fourt, *J.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

GEORGE D. KER and DIANE K. KER,
Defendants and Appellants.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinion Below.

No Opinion was rendered by the trial court.

The Opinion of the District Court of Appeal, Second Appellate District, State of California, is reported at 195 A. C. A. 290 and 15 Cal. Rptr. 767.

A Petition for Rehearing was filed in said Court on September 13, 1961. Said petition was denied on September 20, 1961.

A Petition for Hearing was filed in the Supreme Court of the State of California on October 9, 1961. This petition was denied without Opinion on October 25, 1961. (56 A. C. Minutes p. 4.)

Jurisdiction.

Jurisdiction of this Court is invoked under Section 1257(3) of Title 28, United States Code.

Questions Presented.

Petitioner contends that three questions are presented for review in this matter. (Pet. for Writ of Cert. p. 3) It is the view of Respondent that two questions are presented in this case, as follows:

1. In the light of the facts of this case, was the contraband seized by the police officers taken in violation of the Fourth Amendment to the Constitution of the United States, thus making its introduction into evidence improper under the rule of *People v. Cahan*, 44 Cal. 2d 434, 282 P. 2d 905, 50 A. L. R. 2d 513?

2. If the answer to the foregoing question is "No.", was that evidence nevertheless inadmissible under *Mapp v. Ohio*, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081?

Statement of the Case.

In an information filed in the Superior Court of Los Angeles County, petitioners were charged with possession of marijuana in violation of Section 11530 of the Health and Safety Code, a felony.

To this charge petitioners plead "Not Guilty".

At the commencement of the trial appellant moved the trial court to set aside the information, under Section 995 of the Penal Code, upon the ground that they

have been committed without reasonable or probable cause. Evidence was taken on this issue out of the presence of the jury, and the motion was denied. Thereafter a trial was had before a jury, which returned its verdicts, finding each appellant guilty as charged in the information.

Thereafter appellant brought a timely appeal to the District Court of Appeal, Second Appellate District, State of California, and have since exhausted the state appellate procedures.

Statement of the Facts.

Respondent relies upon the Statement of Facts as set forth in the Opinion of the District Court of Appeal (Pet. for Writ of Cert. App. p. 1), with the addition of the following material:

After observing the meeting between Murphy and Ker, in the vicinity of the oil fields (Pet. for Writ of Cert. App. pp. 2-3), Sergeant Warthen followed the Ker automobile. Ker left the rendezvous, driving south to Slauson, then east on Slauson to LaBrea, then north on La Brea approximately one block. At this point Ker made a U-turn in the middle of the street, between intersections, thus heading back south on LaBrea. As the result of this maneuver Warthen lost the Ker vehicle. [Rep. Tr. p. 17.]

The Opinion of the District Court of Appeal states: "Having had reasonable cause to believe Ker was in his apartment and had in his possession a substantial amount

of marijuana, the officers believing he committed and was committing a felony, entered the premises for the purpose of arresting Ker." (Pet. for Writ of Cert., App. p. 11.) Petitioners question the accuracy of this statement by their reference to the Reporter's Transcript (on p. 8 of the Petition) wherein they state that, after entering the apartment ". . . the officers identified themselves and announced that 'we were conducting a narcotics investigation.'"

However, Mr. Ker testified at the time of trial:

> "Q. 'And proceed telling us what took place after the officers entered? A. Well, I didn't know what was going on and I stood up from my position sitting on the couch, and the officers came in, said, 'You are under arrest,' and handcuffed me. Two of them handcuffed me. One went into the bedroom, the other officer went into the kitchen, right past my wife where she was standing right at the doorway there, and then come out and said, 'Is this yours? We want you to come in here and see this'. So we went in there, well, they took us in there, and said, 'Is this yours?' I said, 'No.' They asked us if we had any knowledge that it was there, if it was ours, and we said, 'No,' it wasn't ours, and we didn't know how it got there. They had asked us these questions and we had just answered, 'No.'" [Rep. Tr. p. 96, line 26, to p. 97, line 14.]

ARGUMENT.

I.

The Officers Had Probable Cause to Believe Appellant George D. Ker Was in Possession of Marijuana at the Time of the Arrest, and the Entry and Search of the Premises Incident Thereto.

Respondent adopts by reference the citations of authority as set forth in the Opinion of the District Court of Appeal. In the interest of brevity, the argument of respondent will be supplemental to the facts and law as stated in said Opinion, avoiding repetition wherever possible.

In California, evidence obtained in violation of constitutional guarantees against unreasonable searches and seizures is inadmissible.

People v. Cahan, supra (44 Cal. 2d 434, 282 P. 2d 905, 50 A. L. R. 2d 513).

But the search of the person who is arrested and the search of his home, place of business, or effects, is proper as an incident to a valid arrest.

People v. Woods, 139 Cal. App. 2d 515, 521, 293 P. 2d 901;

People v. Hurst, 183 Cal. App. 2d 379;

Harris v. United States, 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399;

United States v. Rabinowitz, 339 U. S. 56, 70 S. Ct. 430, 94 L. Ed. 653.

An officer may make an arrest without a warrant:

"1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.

"2. When a person arrested has committed a felony, although not in his presence.

"3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed."

Pen. Code, Sec. 836.

The facts as stated in the Opinion of the District Court of Appeal make it readily apparent that the officers in this case had probable cause to believe that Appellant George D. Ker had committed a felony in their presence. Based on what they knew of Murphy's *modus operandi*, from the observations of the previous evening, the officers were certainly entitled to assume that the same transaction had taken place in the Murphy-Ker rendezvous as had occurred on the previous evening. The two transactions were identical in every detail.

In considering this aspect it should be remembered that the rule having to do with probable cause does not place the ordinary man of ordinary care and prudence in the same class with officers experienced in the detection of narcotic offenders. Conduct and circumstances which might not excite the suspicion of the man on the street might be highly significant to an officer who has had extensive training and experience in the devious and cunning attempts of narcotic offenders to conceal their crimes.

People v. Williams, 196 A. C. A. 828.

In addition to the observations at the rendezvous, the officers were entitled to draw certain conclusions from the sudden U-turn made by appellant on LaBrea Boule-

vard, a street which can be judicially recognized as normally very busy. Under the circumstances this U-turn was properly viewed by the officers as evasive—*i.e.*, conduct of a sort that is usually termed "furtive."

The officers were entitled to view this behavior as furtive conduct, lending further credence to their belief that Ker was a narcotics violator.

People v. Augustine, 152 Cal. App. 2d 204, 205, 313 P. 2d 37;

People v. Tahtinen, 50 Cal. 2d 127, 323 P. 2d 442;

People v. Taylor, 174 Cal. App. 2d 448, 451, 344 P. 2d 837;

People v. Poole, 174 Cal. App. 2d 57, 60-61, 344 P. 2d 30;

People v. McMurray, 171 Cal. App. 2d 178, 185, 340 P. 2d 335;

People v. Amado, 167 Cal. App. 345, 347, 334 P. 2d 254;

People v. Martin, 46 Cal. 2d 106, 108, 293 P. 2d 52.

Since the U-turn would lead one to believe that appellant was apprehensive of being followed, his evasive maneuver was also a red flag to the officers, warning them that he might well attempt to destroy the evidence in his possession. It is judicially recognized that narcotic suspects who are about to be apprehended frequently attempt to destroy or conceal the evidence in their possession, and that the flushing of narcotics

down the toilet is a familiar method of disposing of contraband evidence.

People v. Williams, 175 Cal. App. 2d 774, 776;

People v. Crowley, 193 A. C. A. 316, 320.

The officers were entitled to take immediate action to prevent the loss of the evidence.

People v. Merino, 151 Cal. App. 2d 594, 597, 312 P. 2d 48.

And they were entitled to assume that if they did not effect an immediate entry into appellant's home he would probably attempt to dispose of the evidence.

People v. Maddox, 46 Cal. 2d 301, 305, 294 P. 2d 6;

People v. Ramsey, 157 Cal. App. 2d 178, 184, 320 P. 2d 592;

People v. Shelton, 151 Cal. App. 2d 587, 588, 311 P. 2d 859.

Suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he complied with Penal Code Section 844 (having to do with the method of entry to effect an arrest; see Pet. for Writ of Cert. App. p. 10).

People v. Hammond, 54 Cal. 2d 846, 854, 357 P. 2d 289;

People v. Maddox, supra (46 Cal. 2d 301, 306, 294 P. 2d 6).

In view of the foregoing, we respectfully submit that the evidence in this case was not the subject of an unlawful search and seizure, within the rule of *People v. Cahan, supra* (44 Cal. 2d 434, 282 P. 2d 905, 50 A. L. R. 2d 513), and the line of cases following it. It therefore follows that, insofar as the law of the State of California is concerned, the evidence was properly admitted.

As we read *Mapp v. Ohio, supra* (367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081), the result must be the same under that case. *Mapp* merely requires California to do what it has already been doing for some years under *People v. Cahan, i.e.,* to exclude evidence that has been obtained in violation of the Fourth Amendment. If some distinction between State and Federal rules is to be made, we are not informed of it in the Petition herein.

Other than *Mapp v. Ohio* the only Federal case cited by petitioners is *Agnello v. United States,* 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145. But the distinction between *Agnello* and the case at bar is patent in that in *Agnello* the officers entered for the purpose of searching the premises, and the decision holds that the fact that the officers had proximate cause for the belief that an *article* was concealed in a dwelling house furnished no justification for a search thereof. (269 U. S. at p. 33.)

Respondent relies upon *United States v. Rabinowitz, supra* (339 U. S. 56, 65-66, 70 S. Ct. 430, 94 L. Ed.

653), holding that "reasonableness under all the circumstances" of the individual case is the correct criteria for determination of whether or not a search and seizure has violated a constitutional guarantee. The reasonableness of the search incident to the arrest of appellant George D. Ker is demonstrated by the facts of the case at bar.

Conclusion.

It is respectfully submitted that the record in this case demonstrates that no rights guaranteed to the appellants by the Constitution of the United States were violated. The judgment of the California District Court of Appeal should therefore stand. It is respectfully requested that the petition herein be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 53.

GEORGE D. KER and DIANE K. KER,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

On Writ of Certiorari to the District Court of Appeal of California, Second Appellate District.

Brief Amicus Curiae of the American Civil Liberties Union of Southern California.

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Interest of Amicus Curiae.

The American Civil Liberties Union of Southern California is submitting this brief with the consent of both parties. Said consents are being filed concurrently herewith with the Clerk of this Court. The American Civil Liberties Union is a non-partisan organization dedicated to the preservation of American constitutional civil liberties.

Amicus interest in the present case arises from its belief that the rights guaranteed by the Fourth Amendment have been breached. We believe that the actions of the law enforcement officers of California, sus-

tained by the courts of California, amounted to the unreasonable search and seizure prohibited by the Fourth and Fourteenth Amendments.

Statement of the Case.

On July 27, 1960, three Los Angeles County Deputy Sheriffs went to the apartment house where the petitioners resided. [R. 31, 60.] They then entered the petitioners' apartment, without obtaining a search warrant, and by means of a key obtained from the apartment house manager. (*Ibid.*) Immediately upon entry into the apartment, petitioners were told by the officers that they were "conducting a narcotics investigation." [R. 31, 61.] One of the officers then walked to the kitchen door, and then and there observed what he believed to be (and later was found to be [R. 50]) Marijuana. [R. 31, 61.] The petitioners were then placed under arrest [R. 32, 62], although no warrant for their arrest had been issued. [R. 149.] The apartment was then further searched [R. 63] and more Marijuana discovered. [R. 63, 52.] The following day, still without a search warrant, the automobile registered in the name of the petitioner, Diane K. Ker, was searched and more marijuana was discovered in that automobile. [R. 67.] Prior to entry into the apartment, no suspicion whatever attached to Diane K. Ker, and we suggest that in all events, the entire proceedings were unlawful as to her. The officers' conduct as to George D. Ker was based upon the following circumstances:

(1) Earlier the same evening Ker had been parked alone in his car for some minutes at a location at which a sale of narcotics not involving petitioner was known to have been completed the previous day. [R. 23-24, 20.]

(2) During part of this time and at this place, George D. Ker was observed talking with one of the persons involved in the sale of narcotics the day before. (*Ibid.*)

(3) The police officers had received information from various sources prior to the arrest that the petitioner, George D. Ker, was engaged in marijuana activity. [R. 30.]

(4) After George D. Ker left the location at which he had been observed, he made a U turn. [R. 24.]

Criminal proceedings were instituted against petitioners charging them with violating Section 11530 of the California Health and Safety Code. [R. 1.] At the commencement of trial, the petitioners moved under Section 995 of the Penal Code of California to set aside the information upon the ground they had been committed without reasonable and probable cause. [R. 3.] Evidence was taken on this point and the motion denied. (*Ibid.*) Thereafter, trial was had and the petitioners were found [R. 7, 8] and adjudged guilty. [R. 9.]

The District Court of Appeal, Second Appellate District, State of California, affirmed the conviction in its opinion filed August 29, 1961. [195 Cal. App. 2d 246,

15 Cal. Rptr. 767; R. 145-157.] Hearing was denied by the Supreme Court of the State of California in its order filed on October 25, 1961. [R. 158.] A petition for certiorari was filed in this Court and certiorari granted on January 22, 1962. (*Ibid.*)

Summary of Argument.

The purpose of the entry into the petitioners' apartment was to search for evidence; its discovery was not incidental to an arrest.

The surreptitious entry into the petitioners' home was an unreasonable search and seizure there being an absence of convincing evidence that the arrest could not have been effected in any other way provided by law.

The entry of a dwelling by police officers without a warrant for the purpose of searching to discover whether a crime has been committed, violates the Fourth and Fourteenth Amendments.

Evidence obtained by searches and seizures in violation of the Constitution is inadmissible.

ARGUMENT.

I.

The Search for the Contraband Was Not an Incident of the Arrest, but Rather Was the Purpose of the Entry.

In the probable cause hearing, deputy Berman, one of the arresting officers, testified:

> "We first received a—ascertained that the parties were home, both defendants were home. We then went to the manager of the apartment, identified ourselves, received the key to the apartment, unlocked the door of the apartment. As we entered the apartment, that was myself, Deputy Warthan and Deputy Love, I observed defendant George Ker to be seated on the couch. He stood up immediately. When I identified ourselves as Sheriffs' Narcotics Officers and advised George Ker that we were conducting a narcotics investigation, at which time the defendant, Diane Ker, came from the kitchen of the apartment and I advised her of our identification, identified ourselves and advised her that we were conducting a narcotics investigation. I then proceeded to the kitchen where Mrs. Ker had just left, which Mrs. Ker had just left, and I observed a brown package that had a small tear in it, a square package upon a small scale on the sink in the kitchen. This package contained a green, leafy substance which resembled Marijuana and weighed approximately two and two-tenths pounds. (R. 31.) . . . I then advised them that—the defendants that they were under arrest. I asked—I brought them back into the kitchen, showed them the kilo brick, what appeared to be Marijuana." [R. 32.]

When testifying before the jury, Deputy Berman recited exactly the same sequence of events:

> "We entered the apartment, I observed the defendant, George Ker, to be seated on the couch in the living room. As we entered, he stood up and faced us. I displayed my identification, stated: 'We are Sheriffs' Narcotics Officers, conducting a narcotics investigation.' Simultaneously to that statement the defendant Diane Ker, walked from the kitchen into the living room. I identified myself to her, stated the same facts, then immediately walked to the kitchen without entering, standing in the doorway, I observed a small scale on the top of the sink. The top of the scale was the brick-like—brick-shaped package containing a green, leafy substance." [R. 61.]
>
> . . . "I then advised the defendants that they were under arrest for suspicion of violating the State Narcotics Law." [R. 62.]

Sergeant Warthan, who entered the apartment with Deputy Berman, is silent as to whether the arrest preceded or followed the search for the contraband.

Deputy Markman entered the apartment approximately a minute or minute and a half behind Deputy Berman and Sergeant Warthan. [R. 96.] When he entered the apartment, everyone was in the kitchen (*Ibid.*) and Deputy Berman was *at that time* placing the defendants under arrest. [R. 97.]

It is significant also that the contraband which precipitated the arrest was in the kitchen [R. 61], and

could not be seen without crossing the room to the kitchen door. (*Ibid.*)

The only evidence whatever contradicting the officers as to the sequence of events is, unfortunately, the testimony of the petitioner, George D. Ker. [R. 68-69.] Taking the transcript as a whole, however, he appears to be testifying more to his confusion and indignation at this unwarranted entry into his home than to a precise sequence of events.

Taking the testimony of the officers and recited twice under oath by Deputy Berman, the record points unmistakably to the conclusion that the arresting officers entered the living room, crossed the room past the petitioners to look into the kitchen, there discovered the contraband and *then* placed the petitioners under arrest.

Under these facts, it cannot be argued seriously that the purpose of this "extremely quiet" [R. 93] entry by means of a key procured from a reluctant manager [R. 93;—"He . . . wanted to call his attorney."] was for the principal purpose of arresting these petitioners. If an arrest did precede the search, and it did not, then the conclusion is almost inescapable that the arrest was only a pretext for the search. And this Court has held that: "An arrest may not be used as a pretext to search for evidence." *United States v. Lefkowitz*, 285 U. S. 452, 467.

II.

In Either Event, However, the Surreptitious Entry Into a Man's Home to Effect an Arrest Violates the Fourth Amendment in the Absence of Convincing Evidence That the Arrest Could Not Be Effected in Any Other Way Provided by Law.

The point here is that when lawful procedures are available, then such clandestine procedures as here descend to the "unreasonable search and seizures" prohibited by the Fourth Amendment.

> "The Fourth Amendment and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U. S. 505, 511.

Looking at the record, one is struck by the paucity of evidence against George D. Ker prior to discovery of the contraband in his kitchen. This "evidence"—a conversation with a known narcotics violator at a location where a narcotics transaction was known to have been made a day earlier, unverified rumors over a period of several months, a U turn in the road—could not have supported a conviction nor an indictment. And it is further suggested that such "evidence" is so thin as to make the issuance of a search or arrest warrant highly doubtful.

The inference which leaps into the mind is that these officers resorted to this surreptitious and clandestine

conduct because they doubted that lawful means would meet their ends. The Fourth Amendment

> "prevents the issue of warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every state in the Union. . . . The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the right for the protection of which it was adopted." *Go-Bart Company v. United States*, 282 U. S. 344, 357.

In speaking of a stealthy entry on another occasion, this Court held:

> "The prohibition of the 4th Amendment is against all unreasonable searches and seizures; and if for a government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers, would be an unreasonable, and therefore a prohibited, search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion." *Gouled v. United States*, 255 U. S. 298, 305.

Unquestionably, these officers were also motivated by their knowledge that such contraband is often disposed easily by flushing down the drains. [R. 93.] But we suggest that this is preferable to fostering the cancer of this surreptitious, clandestine, stealthy, furtive entry, without a warrant, into a man's home.

This court refused to tolerate much milder circumstances in *Johnson v. United States,* 333 U. S. 10. In that case officers smelled opium smoke which they traced to a particular hotel room. They knocked; they identified themselves. They placed the defendant, the only person in the room, under arrest. They then searched and found the opium and utensils.

Compare these facts with the case at hand. A witnessed conversation and a U turn in the road do not seem to be stronger evidence of the commission of a crime than the distinct odor of opium coming from a particular hotel room. The knock on the door stands on an infinitely better footing, we believe, than the surreptitious entry here. The arrest and then the search is at least on the same footing as the arrest here. And if we keep the testimony of the officers in mind, the arrest and then search in Johnson, was a little more palatable than the search and then arrest here.

But even these milder facts were unpalatable to this Court, which said about them (333 U. S. at 13-14):

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the

usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often-competitive enterprise of ferreting out crime."

Parenthetically, the Court discussed this same point in *United States v. Lefkowitz*, 285 U. S. 452, 464, *supra*, saying (333 U. S. at 14):

> "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."

This Court in weighing the facts in the *Johnson* case found much the same pretext criticized in *Lefkowitz*, and which appears to be so pronounced here, holding (333 U. S. at 16-17):

> "Thus the government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do. An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers and effects' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."

This is not to say that the detection and arrest of crime is not a matter of concern to society. But we insist, as has this Court, that:

> "The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance." *Johnson v. United States, supra,* 333 U. S. at 14.

III.

If the Entry Is Considered a Search, Then the Entry of a Dwelling, Whether Surreptitiously as Here or Otherwise for a Search of That Place Without a Warrant, Is Unlawful.

> "Belief, however well-founded, that an article sought is concealed in a dwelling-house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful, notwithstanding facts unquestionably showing probable cause." *Agnello v. United States,* 269 U. S. 20, 33.

The argument presented under point II has equal application here. We would further cite, for this proposition, however, *Chapman v. United States,* 365 U. S. 610 and *Taylor v. United States,* 286 U. S. 1. All evidence obtained by searches and seizures in violation of the Constitution is inadmissible. *Mapp v. Ohio,* 367 U. S. 643.

Conclusion.

We are not unsympathetic with the law enforcement officers and their problems in detecting and apprehending violators. Nor are we unconscious of the vicious nature of the crime alleged against the defendants.

It is our view, however, that to permit the law enforcement officers, no matter how well-intentioned, to make surreptitious and clandestine entries as here, without even the semblance of judicial control, is to cut away the heart of the Fourth Amendment. The long-range effect of such tactics on American Constitutional liberties cannot be viewed with equanimity.

Because of this, we urge the Court to hold that evidence obtained as here is evidence obtained through an unconstitutional search and seizure. And as such, it is inadmissible. And that therefore the convictions of these petitioners must be set aside.

Respectfully submitted,

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SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

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GEORGE D. KER and DIANE K. KER,

Petitioners,

—v.—

THE PEOPLE OF THE STATE OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF FOR PETITIONERS

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ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF FOR PETITIONERS

Statement of the Case

The Petitioners were charged in an information filed by the District Attorney of the County of Los Angeles, State of California, with the violation of Section 11530 of the Health & Safety Code of the State of California, to wit: possession of marijuana. After pleas of not guilty and at the commencement of trial the Petitioners moved under Section 995 of the Penal Code of the State of California to set aside the information upon the ground that they had been committed without reasonable or probable cause and that the evidence upon which they were committed was obtained by unlawful search and seizure. Evidence was taken on this point, out of the presence of the jury, and the motion was denied. Thereafter the trial was had and the Petitioners were found guilty. The husband, George D. Ker, was sentenced to the State prison and the wife, Diana Ker, was sentenced to the State prison and the wife, Diane period in the County jail.

The record shows as follows:

(1) Police officers (Deputy Sheriffs of the County of Angeles) had received evidence from November, 1959, to May, 1960, from unidentified persons that George Ker was selling marijuana from his home and that he had probably purchased it from one Murphy (R-30).

(2) The officers received information on four or five occasions during the period of May, 1960, to the date of arrest in July, 1960, from one Black of George Ker's activities in marijuana (R-30). This was categorically denied by Black when he took the stand for the defense (R-40).

(3) The officers observed a meeting between Ker and Murphy at a point in the early evening where they had observed a fellow officer make a purchase from Murphy the night before (R-20, 23, 24). They did not know Ker but secured his address from his license plate (R-24). The spot was well lighted, sufficiently so that they could identify Ker in court (R-28). They did not observe anything pass between Murphy and Ker (R-27).

(4) Approximately one hour later that same evening the officers went to the address of Petitioners as revealed by a check with the Department of Motor Vehicles (R-24), ascertained that someone was home, secured a key from the manager of the apartment, opened the door of Petitioners' apartment, quietly and without knocking entered without permission (R-31).

(5) On entering the apartment George Ker was in the front room sitting down. The officers identified themselves and announced they were conducting a narcotics investigation. They similarly identified themselves to the Petitioner, Diane Ker. The officers then looked in the kitchen and ob-

served a "kilo brick" of marijuana on some scales (R-31). The officers then placed the Petitioners under arrest, conducted an additional search and found some loose marijuana (R-32).

(6) The following day officers went back to the apartment and searched a car belonging to Diane Ker and found additional marijuana (R-67).

(7) The officers had neither a search warrant nor a warrant of arrest for Petitioners (R-149).

Summary of the Argument

In view of the decision the case of *Mapp* v. *Ohio*, 357 U.S. 643 (8 S.Ct. 1684, 6 L. Ed. 2d 1081), the Federal rule with respect to the suppression of evidence seized as a result of an illegal search is now applicable to proceedings in State courts. While the States may provide greater protection to the individual with respect to searches and seizures in the absence of a warrant, they cannot afford less protection than that required under the Federal rules.

The Constitution has placed a magistrate between the police officer and the citizen. The practicability of obtaining a search warrant or a warrant for arrest before the search was demonstrated by the evidence, and the lapse of time between the observation of the suspicious behavior was sufficient to have given the officers time to secure a warrant before entering the apartment.

The general rule is that *no* search is valid without a search warrant. The only exception is an incidental search to a valid arrest. In the instant case the search preceded the arrest. This Honorable Court has never sustained as reasonable an incidental search of a home under a warrantless arrest.

ARGUMENT

I.

The Entry into the Petitioners' Apartment and Subsequent Search and Seizure of Evidence Was a Violation of Petitioners' Constitutional Rights Under the 4th and 14th Amendments to the United States Constitution.

A search which is unreasonable for want of probable cause cannot be made reasonable by what the search uncovers. A search, if unreasonable when it starts, does not change character and become reasonable as result of its success. *Byars* v. *U.S.*, 273 U.S. 28; *Di Ré* v. *U.S.*, 331 U.S. 581; *Johnson* v. *U.S.*, 333 U.S. 10; *McDonald* v. *U.S.*, 335 U.S. 451.

If a contrary rule were to apply there would never be an unreasonable search or a violation of Constitutional rights when contraband was discovered. Such a rule would encourage the continuing police violation of Constitutional protections.

The illegal entry into the home of the defendants in this case was from its inception a violation of their Constitutional rights. The testimony of the arresting officer was in effect that after entering he told the defendants that they were conducting a narcotics investigation. He walked to the kitchen where he saw the contraband, questioned them about it, and then made the arrest. This indicates clearly that the arrest was a result of the search rather than the search being incidental to the arrest.

Since the decision in the case of *Mapp* v. *Ohio*, 357 U.S. 43, a more uniform rule with respect to search and seizures has become inevitable. As in all Constitutional problems concerned with law enforcement, conflicting social objec-

tives tend to obscure the issue. As Justice Cardozo stated in *People* v. *Defore*, 242 N.Y. 13, 24, 150 N.E. 585, 589:

> "On one side is the social need that crime shall be repressed. On the other, the social need that law will not be flouted by the insolence of office."

This conflict has led to the condition described by Justice Frankfurter in the case of *Chapman* v. *U.S.*, 365 U.S. 610, 618 (concurring opinion):

> "The course of true law pertaining to search and seizures . . . has not—to put it mildly—run smooth . . . It is disastrous to law enforcement to leave at large the inconsistent rules laid down in these cases . . . It turns crime detection into a game of 'cops and robbers.'"

It is submitted that this court must be the final arbiter of the constitutional question of what is an unreasonable search under the *Mapp* decision where the conduct of state officers is in issue, irrespective of what the highest court of a state may hold. In *Elkins* v. *United States*, 364 U.S. 206, 224 (1960), this court, deciding that evidence unlawfully seized by state officers could not be admitted in a Federal court, stated:

> "In determining whether there has been an unreasonable search and seizure by state officers, a Federal court must make an independent inquiry, whether or not there has been an inquiry by a state court, and irrespective of how any such inquiry may have turned out."

In those cases where a warrantless search has been sustained, that is to say, "searches of other than dwelling places", the practicability of obtaining a search warrant has been considered by this court as a material element

going to the reasonableness of the search. The officers in the instant case had the time to obtain such a warrant. They were not in hot pursuit of a criminal who had committed a felony in their presence and as a matter of fact, sufficient time was taken to identify the owner of the vehicle in which it was alleged that the defendant George Ker was driving and sufficient time was taken for the arresting officer to join the other officer at the apartment building in which the defendants resided. The justification urged by the People that the illegal entry was necessary in order to prevent the destruction of evidence is not supported by evidence and is controverted by the fact that the defendant George Ker was sitting in his living room and the defendant Diane Ker had been sitting in the kitchen drinking coffee prior to the entry and that no attempt had in fact been made to destroy any of the evidence. There is no proof that the U-turn said to have been made by the defendant George Ker was made to escape surveillance and pursuit. If so, his subsequent conduct as testified to by the prosecution's witnesses is incomprehensible.

If the police are permitted to make a warrantless search in every narcotics case on the theory that evidence may be destroyed, the protection afforded by the Fourth and Fourteenth Amendments will be nullified with respect to this class of defendants. If an illegal search is made legal on the theory of preventing the destruction of narcotics evidence it would hold equally with respect to the possible destruction of other kinds of evidence and the protection of the Amendments could be nullified at the whim of any police official on his bare assertion that he had reason to believe that evidence might be destroyed. It was to insure that the citizens would not be at the mercy of such whims that a magistrate was interposed between the police and the People. Recent history, of which this Honorable Court may well take notice, has demonstrated the probable re-

sults of the unbridled use of police power when that power is not controlled by an impartial judiciary.

The question whether probable cause is a sufficient Constitutional substitute for a search warrant has been considered by this Honorable Court with varying results. In some cases the court has held that probable cause to believe that a crime has been committed is enough. *But this rule has been specifically rejected with respect to private dwellings where it has been held that a search warrant is required.*

McDonald v. *U.S.*, 335 U.S. 451; *Johnson* v. *U.S.*, 333 U.S. 10, 13, 14; *Weeks* v. *U.S.*, 232 U.S. 383; *Agnello* v. *U.S.*, 269 U.S. 20, quoted with approval in *Chapman* v. *U.S.*, 365 U.S. 610, 613 (1961):

> "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. *And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.*"

As Mr. Justice Jackson, speaking for the Court, said in *Johnson* v. *U.S.*, 333 U.S. 10, 13-14:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a

> nullity, and leave the people's homes secure only in the discretion of the police officers."

The decision in *Mapp* affords for the first time the opportunity to make uniform the measure of protection to which the citizens of the various states may look for security of their homes from unwarranted searches. The anarchic condition of the law and the disastrous effects which flow from it, of which Mr. Justice Frankfurter spoke in the *Chapman* case, may now be eliminated.

Since the fundamental principle has been established that the Fourth and Fourteenth Amendments deny the police of the several states the opportunity to obtain admissible evidence through illegal search, it is now possible to delimit the area of legality. The Constitution extends the same measure of protection to every citizen and the nature of this protection is not subject to variance by the happenstance of State residence.

If a clear decision is not made by this Honorable Court applying the Federal Rules in the case at bar, police officers will still be uncertain as to the legality of a search and in the face of such uncertainty will continue to make illegal searches on the theory that perhaps they may be sustained.

There should be no distinction between the minimum constitutional protection which a citizen of one state may enjoy as compared with a citizen of another state.

In *Elkins* v. *U.S.*, 364 U.S. 206, 215, this Honorable Court stated:

> "To the victim, it matters not whether his constitutional right has been invaded by a Federal agent or by a State officer. It would be a curiously ambivalent rule that would require the courts of the United States to differentiate between unconstitutionally seized evidence upon so arbitrary a basis."

Mr. Justice Cardozo in *People* v. *Defore*, 242 N.Y. 13, 22-23, 150 N.E. 585, 588, recognized the incongruity of the unequal standards of admissibility of seized evidence and pointedly suggested that

> "The professed object of the trespasser rather than the official character of the trespasser should test the rights of government. . . ."

It is neither sound reasoning nor good policy in view of the *Mapp* decision to say that evidence unlawfully seized by state officers in violation of the Constitution is inadmissible in a federal proceeding (*Elkins* v. *U.S.*, 364 U.S. 206) but the same evidence may be admissible in a state proceeding if the state courts admit it under their own interpretation of the constitutional question involved.

If citizens of the United States now have an effective constitutional guarantee against unreasonable searches by state officers as well as federal agents there should be an equal application of the rule irrespective of whether they reside in California or Ohio or Washington, D. C.

The citizens of all states should now be entitled as a minimum to the standards set in *Agnello* v. *U.S.*, 269 U.S. 20, *Trupiano* v. *U.S.*, 334 U.S. 699, and *Weeks* v. *U.S.*, 232 U.S. 383.

It cannot be held that the decisions of this Honorable Court repeatedly holding that a warrantless search of a dwelling place is illegal and evidence obtained as result of such a search inadmissible represent needless limitations, refinements or distinction such as were discussed by the California Supreme Court in *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905, 915.

Indeed in *McDonald* v. *U.S.*, 335 U.S. 451, beginning at page 455 the Court said:

"We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted."

II.

The Search Cannot Be Validated as a Search Incident to a Lawful Arrest nor the Arrest Validated as One Made Upon Probable Cause.

The probable cause relied upon by the prosecution to justify the illegal entry into the defendants' home may be summarized as follows:

(1) Periodically over a period of six months from November, 1959 to May, 1960, he had received information from informants that the defendant Douglas Ker was selling marijuana from his home and that he was securing it from Murphy. (Note that so far as the record is concerned the reliability of these informants is unknown.)

(2) For the two months immediately preceding the arrest, the officer had been told by one Black, on four or five occasions, of Defendant Ker's activities and that he believed in the reliability of Black (R-31). The giving of this information was controverted and denied by Black (R-40), and furthermore, the officer did not know how recently the information from Black had been received (R-34).

(3) He had received information from other officers that they saw defendant on the night of the arrest in his car at a point where an officer had made a "buy" the previous night; that the officers did not recognize Ker and did not know him; that the officers had secured his identity from a DMV check; that the officers observed Murphy come to Ker's car and have a conversation with him which they did not overhear; THAT THEY OBSERVED NOTHING PASS BETWEEN MURPHY AND KER (R-27).

There is nothing in the record to show that the officers had any information at the time of the illegal entry that contraband could be expected to be found in the Ker apartment. The officers had no information that the Kers were committing a felony nor had they anything presented to their senses that the defendants were committing a public offense. Therefore, no reasonable cause existed for an arrest of the Kers. The fact is that the officers came not to arrest, but to search without a warrant. The record clearly indicates that the arrest occurred after the arresting officers had walked toward the kitchen and observed the marijuana on the scales. The record indicates the following:

The testimony of the arresting officer was as follows (R-61):

> Q. Now, could you tell us exactly in sequence and detail what happened when you and Sergeant Wasthen entered that apartment?
>
> A. We entered the apartment; I observed the defendant, George Ker, to be seated on the couch in the living room. As we entered he stood up and faced us. I displayed my identification, stated, "We are Sheriff's Narcotics Officers, conducting a narcotics investigation." Simultaneously to that statement the defendant

Diane Ker walked from the kitchen into the living room. I identified myself to her, stated the same facts, then immediately walked to the kitchen without entering, standing in the doorway I observed a small scale on the top of the sink. The top of the scale was the brick-like, brick-shaped package containing the green leafy substance.

Q. This scale was on top of a sink.

A. That is correct.

Q. Were there any pots or pans or anything around it?

A. I believe there was a knife laying on the sink, other than that I don't recall.

Q. What about the paper and this green leafy substance?

A. It was in the same position it is now with a small rip in the package.

Q. And this scale, where was it in relationship to the sink itself?

A. It was on top of the sink at the—just west of the sink, approximately at a foot of it would be in the middle of the sink.

Q. Continue.

A. I then called or beckoned both defendants and Sergeant Warthen into the kitchen. They came over. I pointed to the package. I said, "What is this?" And the defendants answered they did not know. I said, "It appears to be marijuana to me. Is it yours?" And there were no comments made by the defendants.

Q. What do you mean, "no comments"? Did they say anything at all?

A. There was no answer to my question.

Q. You said, "Is it yours"?

A. That is correct.

Q. And nothing was said at all?

A. No answer came from either defendant.

Q. Then what happened?

A. I then advised the defendants that they were under arrest for suspicion of violating the State Narcotics Law.

It would be hard to conceive of testimony more demonstrative of the purpose of the illegal entry. It was obviously made in hopes of finding contraband for which the defendants could then be arrested. Had they not found the contraband, for what charge could they possibly have hoped to arrest the Petitioners pursuant to the information then possessed? What type of a narcotics investigation could the officers have in mind other than to search? Any other explanation is incomprehensible in view of the circumstances surrounding the entry into the apartment. There was not sufficient probable cause to arrest unless the arrest could be justified by the results of the search and the search in turn justified as incidental to the arrest. This "boot strap" argument has been criticized in *United States* v. *Lefkowitz*, 285 U.S. 452, and in *Johnson* v. *United States*, 333 U.S. 10, 16-17:

> "Thus the government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do. An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers and effects' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."

CONCLUSION

Upon the foregoing, Petitioners urge this Court to hold that the entry into their apartment and subsequent search and seizure of the evidence upon which they were convicted was unlawful and the evidence inadmissible. The final test of whether under the Fourth and Fourteenth Amendments to the United States Constitution a search and seizure is unreasonable is one for decision by this Court rather than State Courts. The minimum standards should not be less than those now demanded by this Court in federal proceedings and which have been demanded of federal agents for almost fifty years.

The search cannot be justified as incidental to an arrest since there was not sufficient probable cause to make an arrest and the facts clearly indicate that the entry was not made for the purpose of arrest and the arrest cannot be justified other than by what it produced.

Respectfully submitted,

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Attorney for Petitioners

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IN THE

Supreme Court of the United States

October Term, 1962
No. 53

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Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the District Court of Appeal of California, Second Appellate District.

RESPONDENT'S BRIEF.

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IN THE

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RESPONDENT'S BRIEF.

Introduction.

In 1949, this Court first held that the "security of one's privacy against arbitrary intrusion by the police" is a right "implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." (*Wolf v. Colorado*, 338 U. S. 25, 27-28, 93 L. Ed. 1782, 69 S. Ct. 1359.) In 1954 this Court said: "Now that the Wolf doctrine is known to them, state courts may wish further to reconsider their evidentiary rules." (*Irvine v. California*, 347 U. S. 128, 134, 98 L. Ed. 561, 74 S. Ct. 381.)

On April 27, 1955, the California Supreme Court announced that it had reconsidered its former policy

and it adopted, as one of evidence applicable in the courts of California, the rule excluding, in criminal trials, evidence obtained by means of an unlawful search and seizure. (*People v. Cahan*, 44 Cal. 2d 434, 282 P. 2d 905.) Speaking for a majority of the Court, Justice Traynor said (44 Cal. 2d at p. 451, 282 P. 2d at p. 915):

> ". . . [T]he adoption of the exclusionary rule need not introduce confusion into the law of criminal procedure. Instead, it opens the door to the development of workable rules governing searches and seizures and the issuance of warrants that will protect both the rights guaranteed by the constitutional provisions and the interest of society in the suppression of crime."

In the course of developing such "workable rules" the California appellate courts have decided, since April 1955, more than 500 cases involving the law of search and seizure.[1] (See annotations in 21A McKinney's New California Digest, pp. 653-689, and 1962 Supplement, pp. 49-89. See, also, discussion in 44 Cal. Jur. 2d, pp. 262-417.) The instant case is the first, since *Cahan*, to engage the attention of this Court. It is likewise the first, from any state, to engage this Court's attention since the determination in *Mapp* that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." (*Mapp v. Ohio*, 367 U. S. 643, 655, 6 L. Ed. 2d 1081, 81 S. Ct. 1684.)

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[1] A reasonably comprehensive alphabetical list will be found at the conclusion of this brief. (App. A.)

Statement of the Case.

By information filed by the District Attorney of Los Angeles County, petitioners were charged with possessing marijuana on July 27, 1960, in violation of Section 11530 of the California Penal Code. [Tr. of R. p. 1.] They entered pleas of not guilty and, at the commencement of the trial, made a motion to dismiss the information pursuant to Section 995 of the Penal Code upon the ground that they had been held to answer without reasonable or probable cause. Evidence was taken out of the presence of the jury, whereupon the motion was denied. [Tr. of R. pp. 2-3.] At the conclusion of the trial, petitioners were found guilty as charged in the information, their motion for new trial was denied, probation was granted petitioner Diane Ker on condition that she serve six months in the county jail, and probation was denied to petitioner George Ker, who was sentenced to state prison for the term prescribed by law. [Tr. of R. pp. 6-11.] They appealed from the judgment and the denial of their new trial motion to the District Court of Appeal, which, on August 29, 1961, affirmed the judgment and order. (*People v. Ker*, 195 Cal. App. 2d 246, 15 Cal. Rptr. 767.) A hearing was denied by the California Supreme Court October 25, 1961, and the petition for certiorari was granted January 22, 1962. [Tr. of R. p. 158.]

Statement of Facts.

On July 25, 1960, a confidential informant introduced Sergeant Dennis A. Cook, a Los Angeles County Sheriff's deputy, to one William Terrhagen. At the latter's home, Cook made arrangements to buy a pound of marijuana. [Tr. of R. p. 17.] Terrhagen told

Cook and the informant to go to Lou's Barbecue, on Rosecrans Avenue in Gardena, near Normandie Avenue. The two men did so, meeting Terrhagen at about 8:20 p.m. [Tr. of R. pp. 17-18.] Terrhagen told Cook that he was unable to "get a hold" of the connection at that time but could get the marijuana for him later. They then had a conversation about heroin and Terrhagen sold Cook a small quantity of heroin for $6. [Tr. of R. p. 18.]

The following day, July 26, Cook telephoned Terrhagen at his home at about 7 p.m., stating that he wanted the marijuana they had previously discussed. Terrhagen told him to wait where he was, saying he would pick him up. [Tr. of R. p. 18.]

Terrhagen picked up Cook and drove to the Tropicana Bowling Lanes in Inglewood. He parked in the parking area, explaining he was to meet his "connection" inside, and asked Cook to wait for him. Terrhagen entered the bowling alley and returned in about five minutes. He told Cook he had talked to the "connection" and that the latter was waiting for another man who wanted some marijuana. He said they were to meet "up by the oil fields" near Fairfax and Slauson Avenues. As Terrhagen pulled out of the parking area, he pointed to a 1946 DeSoto, identifying it as the "connection's" car. [Tr. of R. pp. 18-19.]

The two men drove to the vicinity of Slauson and Fairfax, where Cook saw the 1946 DeSoto turning north on Fairfax ahead of them, and Terrhagen again identified it, explaining that the "connection" kept his supply of narcotics "somewhere up in the hills," and he would return. They parked by some vacant fields north of the intersection. Terrhagen asked Cook for the

$70 he had agreed to pay for the marijuana, and Cook gave him the money. [Tr. of R. pp. 19-20.]

Shortly after 8 p.m. Cook saw the DeSoto returning southbound on Fairfax. It went past their car, made a U-turn and pulled up alongside it. Cook observed the driver and recognized him from "mug" photographs as Roland Murphy. Cook had previously learned from other narcotics officers that Murphy "was engaged in the large scale selling of Marijuana, and that at that time he was out on bail for two other Marijuana cases." [Tr. of R. p. 20.]

While Cook waited, Terrhagen got out of his car and entered the DeSoto. Murphy drove Terrhagen northbound on Fairfax into the oil fields up and over a hill, and out of Cook's sight. In about 10 or 15 minutes they returned, driving southbound on Fairfax, went past Terrhagen's car, made a U-turn and pulled up alongside it. Terrhagen got out of Murphy's car, carrying a kilo brick of marijuana, and entered his own. Murphy drove north on Fairfax toward the oil fields and out of Cook's sight. Terrhagen made a U-turn and returned Cook to his home, where he cut a pound of marijuana from the brick, weighed it and gave it to Cook. [Tr. of R. p. 20.]

The same evening, Cook reported what had occurred to Sergeant Elvis A. Warthen, Deputy Leo Berman and to a number of other officers. [Tr. of R. p. 21.] Warthen had also "observed the occurrence" testified to by Cook. [Tr. of R. p. 23.]

On the evening of the following day, July 27, Warthen and Deputy Marvin J. Markman placed Murphy under surveillance. According to Warthen, they followed him as he drove in the DeSoto from his home

in Gardena to the same bowling alley where Cook had met Terrhagen the previous night. Murphy entered the bowling alley, remaining inside for about ten minutes, emerged, drove to a house on 102nd Street, then the officers lost sight of his car. [Tr. of R. p. 23.]

Warthen and Markman drove to the vicinity of Slauson and Fairfax, turned north on Fairfax and parked at the top of a hill. Seated in a car beside an open field with the lights off at approximately the same location where Warthen had seen Murphy meet Cook and Terrhagen the preceding night, they saw a man whom they did not then know, but whom they identified in court as petitioner George Ker. [Tr. of R. pp. 23-24, 28, 84-86, 89, 91, 94-95, 97-99, 102-105.] The officers watched Murphy drive past them, tailed him but lost contact when he turned off his lights after entering the oil fields, returned to their point of vantage, then saw him return. [Tr. of R. pp. 23, 88-89.] Murphy was at this time the officers' primary concern; they became interested in Ker "in that he was parked there alone in that location." [Tr. of R. p. 88.] Murphy stopped behind the Ker automobile, walked up to it on the driver's side and "appeared to have a conversation with him." [Tr. of R. pp. 23-24.] Warthen heard none of the conversation. [Tr. of R. p. 27.] Nor did he see anything pass between the two men, for "Due to the distance and the fact it wasn't extremely light . . . I don't believe I could have seen anything had they had it in their hands." [Tr. of R. pp. 27, 90.]

Immediately thereafter, Ker drove away, going south, then east on Slauson to La Brea, and north on La Brea for approximately one block. Warthen and

Markman followed him, but lost contact when Ker made a U-turn in the middle of the street between intersections and headed south on La Brea. However, having obtained the license number of the Ker vehicle, Warthen checked the registration with the Department of Motor Vehicles and ascertained that it was registered to Douglas Ker, at 4801 Slauson. This information he then communicated to Deputy Berman within 15 to 30 minutes of the meeting between Ker and Murphy which he and Markman had observed. [Tr. of R. pp. 24, 26, 91-92.]

Deputy Berman was one of the arresting officers in the case. Berman had received information concerning petitioner George Ker as early as November 1959. This consisted of "bits of information in regard that he was selling Marijuana from his residence, and that he was possibly securing this Marijuana from Ronnie Murphy, who is the alias of Roland Murphy." In early 1960, Berman received a "mug" picture of Ker from the Inglewood Police Department and he continued to receive information about him until May. [Tr. of R. pp. 29-30.] Between May and July, he likewise received information concerning Ker from one Robert J. Black. Black had previously given Berman information which resulted in two arrests and in facilitating the investigation of Murphy and Berman believed him to be a reliable informant. [Tr. of R. pp. 30-31.] Black told Berman that he, Ker, and other persons had purchased quantities of marijuana from Murphy.[2] [Tr. of R. p. 33.]

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[2]The answer at the foot of page 33 of the Transcript of Record was corrected, by stipulation filed in the District Court of Appeal on July 17, 1961, to read as follows: "In regard to Mr. Murphy,

Pursuant to this information, and having learned from Cook and Warthen what had occurred that night and the preceding night, Berman went with Warthen and Deputy Love to an apartment house at 4801 West Slauson Avenue. [Tr. of R. pp. 29-31.] Upon their arrival, Warthen went to the parkling lot and ascertained that Ker's automobile was there. Then he directed another officer to see whether there was anyone in Ker's apartment. After learning that petitioners were home, Warthen went to the manager's office, identified himself and told the manager that he was going to enter Apartment No. 29 because he "had reason to believe there was a large quantity of Marijuana in the apartment." He asked the manager for the key "so that we would not have to knock the door down," and the manager said he wanted to call his attorney. [Tr. of R. pp. 31, 92-93.]

Warthen obtained the key from the manager and went to the apartment. He unlocked the door and was the first to enter, being careful to be extremely quiet on entering to protect "whatever evidence" was in the apartment "[B]ecause on many, many occasions persons have flushed narcotics down toilets, pushed them down drains and sinks and many other methods of getting rid of them prior to my entrance when I have

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that he had purchased quantities of marijuana (~~for~~) *from* Mr. Murphy, that Mr. Ker had purchased quantities of marijuana (~~for~~) *from* Mr. Murphy, and other persons had purchased quantities of marijuana from Mr. Murphy." A similar stipulation is on file with this Court. Black took the stand and denied having or giving Berman any information about Ker. [Tr. of R. p. 40.] Murphy was arrested July 30, 1960 and a complaint was filed against him for violation of the federal narcotic laws. [Tr. of R. p. 29.]

made noises in the process of entering."[3] [Tr. of R. p. 93.]

Warthen did not describe what occurred upon his entry into the apartment. Berman testified that upon entering he observed it to consist of a large living room, a kitchen, a bathroom and a bedroom. [Tr. of R. p. 60.] When asked to describe the entry in detail, he said:

> "We entered the apartment, I observed the defendant, George Ker, to be seated on the couch in the living room. As we entered he stood up and faced us. I displayed my identification, stated, 'We are Sheriff's Narcotics Officers, conducting a narcotics investigation.' Simultaneously to that statement the defendant Diane Ker, walked from the kitchen into the living room. I identified myself to her, stated the same facts, then immediately walked to the kitchen without entering, standing in the doorway I observed a small scale on the top of the sink. The top of the scale was the brick-like—brick-shaped package containing the green leafy substance." [Tr. of R. p. 61.]

After seeing the marijuana on the scale,[4] Berman beckoned petitioners and Warthen into the kitchen. Pointing to the package, he asked petitioners "What is this?" and they replied they did not know. When Berman said: "It appears to be Marijuana to me. Is it yours?" petitioners did not answer. Then he "advised

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[3]In order to further guard against an anticipated destruction of evidence, Deputy Markman was stationed beneath the window of the Ker apartment. He testified: "That is a usual procedure in case evidence of any nature would be attempted to be disposed of by throwing it out the window." [Tr. of R. p. 96.]

[4]The package [Ex. 1] contained 2-2/10 lbs., or one kilogram of the contraband. [Tr. of R. pp. 31, 49-50.]

the defendants that they were under arrest for suspicion of violating the State Narcotic Law." [Tr. of R. pp. 61-62.]

Deputy Markman who, as previously mentioned, had been stationed beneath petitioners' apartment window, entered the apartment a minute or a minute and a half after the other officers. When he did so, petitioners and the other officers were in the kitchen. [Tr. of R. p. 96.] He heard Berman say: "[S]o that there will be no misunderstanding, we are narcotics officers conducting a narcotic investigation, and you are placed under arrest for violating—suspicion of violating State Narcotic Laws." [Tr. of R. p. 97.]

Petitioner George Ker testified as follows concerning the officers' entry:

> "Well, I didn't know what was going on and I stood up from my position sitting on the couch, and the officers came in, said, 'You are under arrest', and handcuffed me. Two of them handcuffed me. One went into the bedroom, the other officer went into the kitchen, right past my wife where she was standing right at the doorway there, and then come out and said, 'Is this yours? We want you to come in here and see this.' So we went in there, well, they took us in there, and said, 'Is this yours?' I said, 'No.' They asked us if we had any knowledge that it was there, if it was ours, and we said, 'No', it wasn't ours, and we didn't know how it got there. They had asked us these questions and we had just answered, 'No.'" [Tr. of R. pp. 68-69.]

The remaining evidence may be set out more briefly. After asking petitioners whether they had any other contraband, and receiving a negative answer, the officers (in the words of the court below):

> ". . . . [T]hen took defendants into the bedroom; there they saw a box containing ½ ounce of marijuana (Exhibit 2) atop a dresser; asked if it was theirs, defendants remained silent. Sergeant Warthen searched the kitchen and found in the cupboard a brown manila bag containing ½ ounce of marijuana (Exhibit 2); asked to whom it belonged, defendants remained silent. Warthen also saw in the kitchen a cup containing coffee, a partially eaten slice of toast and some silverware on the table, and a coffee pot on the drainboard close to the marijuana on the scales. Mrs. Ker told Warthen that she had been sitting at the table in the kitchen drinking coffee and eating toast, but had not looked in the direction of the marijuana. Sergeant Warthen then asked the defendants if they owned any other auto than the one parked in the back and which they had seen Ker driving; Ker said they did not; Mrs. Ker remained silent. Berman had information Mrs. Ker owned a car; around noon the next day he went to the car which was registered in the name of Diane Ker, searched it and found marijuana seed under the rear seat and a bag containing marijuana (Exhibit 3) in the dashboard compartment." (*People v. Ker, supra*, 195 Cal. App. 2d 246, 252, 15 Cal. Rptr. 767, 770.)

ARGUMENT.

I.

Under the Fourteenth Amendment to the United States Constitution California Remains Free to Apply and Enforce Her Own Reasonable "Workable Rules Governing Searches and Seizures."

It was said in the main opinion in *Mapp v. Ohio, supra,* 367 U. S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684, that the right of privacy guaranteed by the Fourth Amendment is to be enforced against the states by requiring them, under the due process clause of the Fourteenth, to exclude, in criminal trials, evidence obtained through an unlawful search and seizure. This much is certain. What remains uncertain is whether, by virtue of some invisible emanation from the Fourteenth Amendment, the states are required to apply to cases arising in their courts the identical standards that are applied to cases arising in the federal courts under the Fourth.

California did not adopt the exclusionary rule because it was obliged to do so. It did so because "Experience has demonstrated . . . . that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures." (*People v. Cahan, supra,* 44 Cal. 2d 434, 447, 282 P. 2d 905, 913.) And, in so doing, the California Supreme Court held itself free to develop "workable rules governing searches and seizures": to follow federal precedent when reasonable, disregarding it where it set "needless limitations on the right to conduct reasonable searches and seizures or to secure warrants. . . . ." (*People v.*

Cahan, *supra*, 44 Cal. 2d 434, 450-451, 282 P. 2d 905, 915. See, for example, *People v. Simon*, 45 Cal. 2d 645, 649, fn., 290 P. 2d 531, 533.)

It is the position of respondent that California's uncompelled, uncoerced decision to establish the exclusionary rule is one to be praised, not censured, that its development of standards reasonably adapted to its own needs is one to be encouraged, not stultified, and that the constitutional provisions ought not to be so dogmatically interpreted as to substitute for the decisional *law of California* rules created by the federal courts for use in a separate judicial system, involving separate crimes, a separate criminal procedure, and separate agencies of enforcement having separate problems and methods of enforcement. Acceptance of this position respondent submits, is necessary to the maintenance of a system in which the states are free, within "a concept of ordered liberty," to administer their own criminal laws and to seek salvation in their own way.

There are compelling practical reasons for allowing the states a degree of autonomy (hence a degree of diversity) in developing rules of search and seizure to be applied in their own courts. This brief was prepared at a desk near a window overlooking the Los Angeles Civic Center. Two blocks away, in the Police Administration Building, are based the dedicated, competent and well-trained men responsible for local law enforcement in the area. One block away, in the United States Courthouse and Post Office Building, are based the men, equally dedicated, equally competent, equally well-trained, who are responsible for enforcing federal law in a somewhat larger area. But their problems and methods are not necessarily the same.

Most federal arrests are made with a warrant; most local arrests are not. Local officers cruise in prowl cars; federal agents do not. Local police pound a beat at night; federal agents do not. Their investigations are often deliberate and prolonged, conducted under the supervision of an Assistant United States Attorney, and involving a limited category of crime. The local officer, on the other hand, is confronted, at every moment, and on the spur of the moment, with preventing and detecting every crime the imagination can conceive, and the law has the foresight to prohibit. And if this is the case in a large metropolis, how much more striking is the divergence between the situations confronting the federal agent and the officer in a rural California area, whose police force may consist of a chief of police and a handful of subordinates.

Furthermore, California shares with New York and a few other border and seashore states a narcotic problem which has severely taxed its enforcement and rehabilitation facilities. Other states which do not have this problem have yet other problems of enforcement which California does not share. There being a diversity of problems among the states, there should be permitted them a reasonable divergence in the specific standards they adopt in enforcing the constitutional right to privacy which is guaranteed to all who reside in them. (See Weinstein, Local Responsibility for Improvement of Search and Seizure Practices, 34 Rocky Mt. L. Rev. 150 (1962).)

To say, with petitioners, that there must be uniformity, would be to take the line of least resistance, to evade the inconsistencies in previous decisions of this Court and to forget that "[T]he course of true law

pertaining to searches and seizures, as enunciated here, has not—to put it mildly—run smooth." (Mr. Justice Frankfurter concurring in *Chapman v. United States*, 365 U. S. 610, 618, 5 L. Ed. 2d 828, 81 S. Ct. 776. See, also, Collings, Toward Workable Rules of Search and Seizure—An Amicus Curiae Brief, 50 Cal. L. Rev. 421 [1962], to which respondent is heavily indebted.) To say, with petitioners, that without uniformity "police officers will still be uncertain as to the legality of a search", is to ignore the practical and conceptual difficulties involved in imposing it. In this respect, California's experience is of immediate relevance. Her courts have decided over 500 search and seizure cases in the past 7½ years. (See App. A.) In the next 7½ years they will decide as many more. And, as this Court has recognized, "there can be no fixed formula . . ." (*Mapp v. Ohio, supra*, 367 U. S. 643, 653, 6 L. Ed. 2d 1081, 81 S. Ct. 1684.) To create one, or to attempt to create one, would be to open the gates to a flood of applications for writs of certiorari, all seeking a determination in a multitudinous variety of circumstantial detail, that Officer A did not have probable cause to arrest Offender B, or that Officer C conducted too extensive a search of premises belonging to Offender D. The burden upon this Court would rapidly become intolerable. And to hold that the states are necessarily bound by federal decisional law (such as it is and such as it may become) would be to inject into the law of California a confusion all would eventually

deplore, and to encourage the police to take risks in ambiguous cases in a hope that under some decision they have never heard of their conduct might perhaps be sustained. Law enforcement officers in California know that if they transgress the limitations placed upon them by her appellate courts the criminal will go free because they have blundered. Often they must decide, within a few moments, whether to arrest or not to arrest. In cases where the law of the state is clear, but this Court has not yet spoken, are they to reconcile at their peril conflicting decisions in the Circuits or must they stay their hand?

Respondent submits that this Court should not summarily disregard California's experience in a desire for symmetry, and should not strike down the standards of police conduct imposed by her judiciary in an effort to "protect both the rights guaranteed by the constitutional provisions and the interest of society in the suppression of crime." (*People v. Cahan, supra*, 44 Cal. 2d 434, 451, 282 P. 2d 905, 915.) If these standards are such that reasonable men may regard them as affording adequate protection to the right of privacy, they ought to be sustained. In the remainder of this brief, respondent will urge that the California courts have adopted such standards and that under those standards petitioners' arrest and the seizure of the contraband in their possession can and should be upheld.

II.

There Was No Violation of Petitioners' Rights Under the Fourteenth Amendment to the United States Constitution.

Respondent contends that the marijuana in petitioners' possession was not obtained by the officers through an unreasonable search and seizure. In so contending, respondent will justify its position upon the basis of California and federal law where they agree, and, where they apparently disagree, upon the basis of California law, which respondent submits is reasonable, is not in derogation of constitutional guarantees and provides adequate standards for the protection of persons accused of crime in the California courts.

A. The Officers Had Probable Cause to Arrest Petitioner George Ker for Possessing Marijuana at the Time They Entered the Apartment.

Section 836 of the California Penal Code provides:

> "A peace officer may make an arrest in obedience to a warrant, or may, without a warrant, arrest a person: 1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence. 2. When a person arrested has committed a felony, although not in his presence.[5] 3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed."

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[5]Subdivision 2 will not, however, justify a search incident to an arrest where the arrest itself is not based upon "reasonable cause." (*People v. Brown*, 45 Cal. 2d 640, 290 P. 2d 528.)

The terms "reasonable cause" and "probable cause" are synonymous. (*People v. Kilvington*, 104 Cal. 86, 37 Pac. 799.) The latter is defined as follows:

> "Probable cause exists where the facts and circumstances within their [the officers'] knowledge, and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." (*Brinegar v. United States*, 338 U. S. 160, 175-176, 93 L. Ed. 1879, 69 S. Ct. 1302.)[6]

Respondent submits that, acting as "reasonable and prudent men, not legal technicians," the officers were warranted in believing Ker to be in possession of marijuana at the time they approached the apartment. It must be borne in mind that "[P]robable cause is not to be evaluated from a remote vantage point of a library but rather from the viewpoint of a prudent and cautious police officer on the scene at the time of arrest. The question to be answered is whether such an officer in the particular circumstances, conditioned by his observations and information, and guided by the whole of his police experience, reasonably could have believed that a crime had been committed by the person to be arrested." (*Jackson v. United States* (D. C. Cir.), 302 F. 2d 194, 196.)

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[6]*Cf. People v. Kilvington, supra*, 104 Cal. 86, 92, 37 Pac. 799, 801: "There must be such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that the person is guilty."

The following facts were known to the officers on the night of July 27:

1. Between November 1959 and May 1960, Deputy Berman had received information that Ker was obtaining marijuana from Roland Murphy and selling it from his home. [Tr. of R. pp. 29-30.] Between May and July, he learned from Black, a reliable informant, that Ker had purchased quantities of marijuana from Murphy. [Tr. of R. p. 33.]

2. On July 26, while conducting a narcotics investigation, Deputy Cook witnessed a transaction between Murphy and one Terrhagen. Murphy's *modus operandi* was as follows: He met Terrhagen at a bowling alley in Inglewood. Terrhagen drove Cook to the vicinity of Slauson and Fairfax and parked by some vacant fields north of the intersection. Murphy's car passed by heading north, then returned, made a U-turn, and parked alongside Terrhagen, who got into Murphy's car, drove north with him into the oil fields, returned and left the car, carrying a kilo brick of marijuana, entered his own car, made a U-turn and took Cook to his home. [Tr. of R. pp. 18-20.]

3. Cook reported what he had seen to Berman and to Deputy Warthen, who had maintained Cook and Terrhagen under surveillance. [Tr. of R. pp. 21-23.]

4. The next night, Warthen and Deputy Markman followed Murphy in the same car to the same bowling alley, lost contact with him but went to the same area as the night before, saw a car parked in approximately the same location where Terrhagen had parked his, observed Murphy drive north into the oil fields, return, park beside the other car, walk up and talk to the driver,

who left, making a U-turn and causing the officers to lose contact. [Tr. of R. pp. 23-24, 27, 84-86, 88-89, 91, 94-95, 97-99, 102-105.]

5. Within 15 to 30 minutes of the meeting between Murphy and the man in the other car, Warthen traced the license number and ascertained Ker's name and address, giving this information and telling what he had observed to Berman, who, as previously mentioned, had learned Ker was buying marijuana from Murphy and selling it from his home, who had seen Ker's photograph and who could presumably identify him. [Tr. of R. pp. 24, 26, 29-30, 33, 92.]

It is true that Warthen and Markman did not observe an actual exchange of contraband between Murphy and Ker. But there is a law of uniformity in nature upon which all men, including the police, have a right to rely. They had witnessed a pantomime which repeated in all essential details the transaction of the previous night. They were entitled to regard Ker's U-turn as furtive conduct. They and their fellow officers were entitled to view what they had observed in the light of the information received from Black, an informer whose veracity had been tested and not found wanting. (*Draper v. United States*, 358 U. S. 307, 312-313, 3 L. Ed. 2d 327, 79 S. Ct. 329; *People v. Boyles*, 45 Cal. 2d 652, 290 P. 2d 535; *Willson v. Superior Court*, 46 Cal. 2d 291, 294 P. 2d 36.) And upon learning that Ker was at home, they were entitled to believe, as reasonable and prudent men, that he had the contraband with him in his apartment. They were not obliged to wait until they had proof sufficient to sustain his conviction. (*Brinegar v. United States*, *supra*, 338 U. S. 160, 172-175, 93 L. Ed. 1879, 69 S. Ct. 1302.)

At the conclusion of the hearing on probable cause, the trial court said: "Therefore, the court determines it is probable cause, and we will proceed tomorrow morning with this case." [Tr. of R. p. 45.] This finding was upheld by the court below. (*People v. Ker, supra*, 195 Cal. App. 2d 246, 15 Cal. Rptr. 767.) Not only was it a reasonable one, it was a finding which, under traditional canons of review, this Court is obliged to respect. (*Eisenba v. California*, 314 U. S. 219, 238, 86 L. Ed. 166, 62 S. Ct. 280; *Thomas v. Arizona*, 356 U. S. 390, 402-403, 2 L. Ed. 2d 863, 78 S. Ct. 885; *Crooker v. California*, 357 U. S. 433, 435, 2 L. Ed. 2d 1448, 78 S. Ct. 1287; *Culombe v. Connecticut*, 367 U. S. 568, 603-604, 6 L. Ed. 2d 1037, 81 S. Ct. 1860.)

B. The Officers Lawfully Entered the Apartment for the Purpose of Arresting Petitioner George Ker.

Section 844 of the California Penal Code provides:

> "To make an arrest, a private person, if the offense be a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired."

Upon ascertaining that Ker's automobile was parked in the parking lot and that petitioners were at home, Warthen obtained a key from the manager and, followed by Berman and Deputy Love, he made a surreptitious entry into the apartment. [Tr. of R. pp. 31, 92-93.] As found by the court below, the entry

was for the purpose of making an arrest. (*People v. Ker, supra*, 195 Cal. App. 2d 246, 15 Cal. Rptr. 767.)

The officers did not comply with Section 844. But respondent submits that, as likewise found by the court below, compliance was unnecessary under a judicially created exception to the statute. The California Supreme Court has said (*People v. Maddox*, 46 Cal. 2d 301, 305-306, 294 P. 2d 6, 9-10):

> "The demand and explanation requirements of section 844 present a more difficult problem. The officer's compliance with them will delay his entry, and cases might arise in which the delay would permit destruction or secretion of evidence so that what the search turns up would depend on the officer's compliance with the section. In other cases, however, the evidence may not be readily disposed of, and in still others it may be impossible to determine whether or not the evidence would still have been available had there been the delay incident to complying with the section.
>
> "It must be borne in mind that the primary purpose of the constitutional guarantees is to prevent unreasonable invasions of the security of the people in their persons, houses, papers, and effects, and when an officer has reasonable cause to enter a dwelling to make an arrest and as an incident to that arrest is authorized to make a reasonable search, his entry and his search are not unreasonable. Suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he

complied with section 844. Moreover, since the demand and explanation requirements of section 844 are a codification of the common law, they may reasonably be interpreted as limited by the common law rules that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose. (Read v. Case, 4 Conn. 166, 170 [10 Am. Dec. 110]; see Rest., Torts, § 200, com. d.) Without the benefit of hindsight and ordinarily on the spur of the moment, the officer must decide these questions in the first instance. When, as in this case, he has reasonable grounds to believe a felony is being committed and hears retreating footsteps, the conclusion that his peril would be increased or that the felon would escape if he demanded entrance and explained his purpose, is not unreasonable. In this proceeding we are not concerned with whether or not the officer's failure to do so would have justified defendant in using force to protect his person or property, or whether or not a jury, in a trespass action might conclude that reasonable cause for the officer's failure to comply with the demand and explanation requirements did not exist. Moreover, since the officer's right to invade defendant's privacy clearly appears, there is no compelling need for strict compliance with the requirements of section 844 to protect basic constitutional guarantees. (Cf. People v. Boyles, supra, 45 Cal. 2d 652, 656; People v. Cahan, supra, 44 Cal. 2d 434, 442, footnote.) We conclude therefore that when there is reasonable cause to make an arrest and search and

the facts known to him before his entry are not inconsistent with a good faith belief on the part of the officer that compliance with section 844 is excused, his failure to comply with the formal requirements of that section does not justify the exclusion of the evidence he obtains."

The exception defined and defended in *Maddox* has been interpreted to apply to cases where the officers reasonably believed that if they did not gain immediate entrance evidence would be destroyed. (*People v. Hammond*, 54 Cal. 2d 840, 9 Cal. Rptr. 233; *People v. Ruiz*, 146 Cal. App. 2d 630, 304 P. 2d 175; *People v. Ramsey*, 157 Cal. App. 2d 178, 330 P. 2d 592. But see *Miller v. United States*, 357 U. S. 301, 309, 2 L. Ed. 2d 1332, 78 S. Ct. 1190, where *Maddox* is referred to without approval or disapproval.)[7]

In the present case, Markman was stationed beneath petitioners' window, "a usual procedure in case evidence of any nature would be attempted to be disposed of by throwing it out the window." [Tr. of R. p. 96.] And Warthen testified that he entered quietly "to protect whatever is in the apartment," because "on many, many occasions persons have flushed narcotics down toilets, pushed them down drains and sinks and many other methods of getting rid of them prior to my entrance when I have made noises in the process of entering." [Tr. of R. p. 93.]

It is said that allowing suspects to dispose of narcotic contraband with immunity would be "preferable

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[7] The government conceded in *Miller* that under the facts of that case there were no "circumstances excusing compliance" (*Loc. cit.*)

to fostering the cancer of this surreptitious, clandestine, stealthy, furtive entry, without a warrant, into a man's home." (Brief of Amicus Curiae, p. 10.) But the law should not be guilty of such self-stultification. "Here we are dealing with a type of property that, at a moment's notice and the merest suspicion that government agents are on the scent, can be flushed down a toilet." (*Carlo v. United States* (2d Cir.), 286 F. 2d 841, 847.)* It is manifest that if the officers had knocked on the door, politely identified themselves and explained their purpose, the marijuana would instantly have been jettisoned and it is submitted that the California rule permitting them entry is a reasonable one which ought to be upheld.

C. The Kilo Brick of Marijuana Was Lawfully Seized as an Incident to the Lawful Arrest of Petitioner George Ker.

The Fourth Amendment does not condemn all searches; it condemns unreasonable ones. (*Harris v. United States*, 331 U. S. 145, 150, 91 L. Ed. 1399, 67 S. Ct. 1098.) Whether a search is reasonable is a question to be determined in the first instance by the trial court upon the facts of a particular case. (*Go-Bart Importing Co. v. United States*, 282 U. S. 344, 357, 75 L. Ed. 374, 51 S. Ct. 153; *United States v. Rabinowitz*, 339 U. S. 56, 63, 94 L. Ed. 653, 70 S. Ct. 430; *Mapp v. Ohio, supra*, 367 U. S. 643, 653, 6 L. Ed. 2d 1081, 81 S. Ct. 1684.) And respondent presumes it to be settled law that officers have the right to search the person of the accused, and the premises under his immediate control, when the search is

*A "type of property" whose use is not simply *malum prohibitum* but can lead to the total demolition of the personality.

incident to a lawful arrest pursuant to a warrant or based upon probable cause. (*Weeks v. United States*, 232 U. S. 383, 392, 58 L. Ed. 652, 34 S. Ct. 341; *Harris v. United States*, *supra*, 331 U. S. 145, 150-152, 91 L. Ed. 1399, 67 S. Ct. 1098; *Draper v. United States*, *supra*, 358 U. S. 307, 310-311, 3 L. Ed. 2d 327, 79 S. Ct. 329.)

It must be borne in mind that the officers had probable cause to arrest Ker at the moment they entered the apartment and they entered it lawfully in a reasonable belief that a request to be admitted would result in the disposal of narcotic contraband. The arrest of Ker was therefore a lawful one, and the question is whether the kilo brick of marijuana found in the kitchen [Ex. 1] was lawfully seized as an incident to the arrest. No contention is made that the marijuana later found in the bedroom, the kitchen cupboard and Mrs. Ker's automobile [Exs. 2 and 3] was unlawfully secured for reasons apart from those relied upon in challenging the seizure of the kilo brick.[9]

Petitioners say that the seizure may not be sustained because the officers did not have a search warrant and because the "search" preceded the arrest and the arrest was merely a pretext for a search.

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[9]Furthermore, no objection was interposed to their admission in evidence. [Tr. of R. p. 68.] An objection was necessary under California law. (*People v. Brittain*, 149 Cal. App. 2d 201, 308 P. 2d 38.) This procedural requirement "must be respected." (*Mapp v. Ohio*, *supra*, 367 U. S. 643, 659, fn. 9, 6 L. Ed. 2d 1081, 81 S. Ct. 1684.)

1. *The Seizure Was Lawful Notwithstanding the Absence of a Search Warrant.*

Petitioners say: "The question whether probable cause is a sufficient substitute for a search warrant has been considered by this Honorable Court with varying results. In some cases the court has held that probable cause to believe that a crime has been committed is enough. But this rule has been specifically rejected with respect to private dwellings where it has been held that a search warrant is required." (Brief for Petitioners, p. 7.)

In this connection, reliance is mainly placed upon *Agnello v. United States*, 269 U. S. 20, 70 L. Ed. 145, 46 S. Ct. 4; *Taylor v. United States*, 286 U. S. 1, 76 L. Ed. 951, 52 S. Ct. 466; *Johnson v. United States*, 333 U. S. 10, 92 L. Ed 436, 68 S. Ct. 367; and *Chapman v. United States, supra*, 365 U. S. 610, 5 L. Ed. 2d 828, 81 S. Ct. 776. Respondent submits, however, that in the light of their facts, none of these cases are susceptible of so broad a construction.

In *Agnello*, this Court held that the search of a house was not an incident to a lawful arrest made in another house some two blocks away. In *Taylor*, this Court struck down a warrantless search of an unoccupied garage containing 122 cases of whiskey which were unlikely to disappear while the officers went to obtain a warrant. This Court said (286 U. S. 1, at p. 6): "The record does not make it necessary for us to discuss the rule in respect of searches in connection with an arrest. No offender was in the garage; the action of the agents had no immediate connection with an arrest. The purpose was to secure evidence to support

some future arrest." In *Johnson*, this Court held improper a warrantless search of an apartment, the government in effect having conceded that the officer did not have probable cause to arrest the defendant until after he had entered and discovered that it was the defendant who was responsible for the odor of opium that impelled him to enter. In *Chapman*, officers having the apparent consent of his landlord smelled the odor of whiskey mash in the defendant's house, entered it when nobody was home and found a distillery, together with 1300 gallons of mash that were unlikely to disappear. The government in effect conceded that the search was unreasonable, relying only upon a Georgia landlord's supposed right to "view waste" (a right this Court found to be nonexistent) and, the defendant not being present, the search was obviously not incident to his later arrest.

If the foregoing cases hold, which respondent disputes, that the police may not search a dwelling as an incident to a lawful arrest made therein without first obtaining a search warrant, what is to be done with *Rabinowitz*?[10] There it was said (339 U. S. 56, at p. 66): "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."[11] This is the test applied in Cali-

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[10]339 U. S. 56, 94 L. Ed. 653, 70 S. Ct. 430.

[11]A federal statute authorizes agents of the Bureau of Narcotics and Bureau of Customs to make arrests without warrant in narcotics cases "where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation." (26 U.S.C.A. 7607.) It has been held that the statute does not apply only where there is no time to obtain a search warrant. (*United States v. Vasquez* (D.C.E.D.N.Y.), 183 F. Supp. 190.)

fornia. (*People v. Winston*, 46 Cal. 2d 151, 162-163, 293 P. 2d 40, 46-47.) If it is to disappear in a new synthesis of federal law, respondent nevertheless submits that in maintaining it California would in no way depart from a "concept of ordered liberty" or deprive its citizens of "the security of one's privacy against arbitrary intrusion by the police."

In the first place, California has condemned the general exploratory search and her courts have not hesitated to reverse convictions based upon evidence obtained through searches conducted in excess of reasonable bounds. (See *People v. Schaumloffel*, 53 Cal. 2d 96, 346 P. 2d 393; *People v. Mills*, 148 Cal. App. 2d 392, 306 P. 2d 1005.) In the second place, it can be held by reasonable men anxious to preserve constitutional guarantees that an inflexible rule requiring a search warrant if there is time to get one would be completely unworkable. Professor Collings writes in the article previously mentioned (50 Cal. L. Rev. 421, at 466-447):

> ". . . Overextensive use of search warrants would put an impossible burden on our already undermanned law enforcement personnel. To illustrate, suppose that officers have an anonymous tip that someone is selling narcotics at a specified address. They have insufficient information to justify either an arrest or a search warrant. Consequently, they watch the house and see known addicts enter and leave. They question one addict who admits making a buy. They may or may not arrest him because their primary interest is in the seller. At this point it would be tactically unsound for the officers to go after a warrant. Someone

ha[illegible] seen them talking to the addict and t[illegible] the seller. The supply of narcotics is di[illegible] So they knock on the door and make arr[illegible] Assuming the rule is that they must get [illegible] arrant before searching the house, an rec[illegible] begins. A fellow officer must be o[illegible] the house (if the arresting officer [illegible] ate enough to have one with him). The c[illegible] er cannot take the defendant to the sta- al[illegible] so he must wait for assistance. When ar[illegible] ve[illegible], he takes the defendant to the station h[illegible] him. Thereafter, he goes to the district [illegible] office, and after a short wait, sees a [illegible] ry a[illegible] satisfies him that a warrant should [illegible]e. T[illegible] gether they dictate an affidavit (which h[illegible] to be lengthy to satisfy existing stand-) to a stenographer. She types the affidavit wa[illegible] rant. After checking them for accuracy, [illegible]pu[illegible] ty and peace officer go to the magistrate. [illegible] a short wait, since a trial is in progress, the str[illegible]te sees them and satisfies himself that [illegible]rrant should issue. The peace officer then [illegible]ack to the house to execute the warrant. [illegible]rocess can be completed in two hours under [illegible]nditions. But how often will conditions be [illegible] The arrest may take place many miles away [illegible]he nearest deputy district attorney. It may night (most arrests are), during the lunch [illegible] or over the weekend. It will often be im- [illegible]le to find a deputy district attorney other during business hours; even if one did, he still have the problem of locating a magis-

Furthermore, as respondent understands their argument, petitioners are contending that the officers should have obtained a warrant before entering the apartment. They say:

> "The officers in the instant case had the time to obtain such a warrant. They were not in hot pursuit of a criminal who had committed a felony in their presence and as a matter of fact, sufficient time was taken to identify the owner of the vehicle in which it was alleged that the defendant George Ker was driving and sufficient time was taken for the arresting officer to join the other officer at the apartment building in which the defendants resided." (Brief for Petitioners, p. 6.)

But the argument is untenable. According to Markman, he and Warthen arrived at the corner of Slauson and Fairfax at 8:45 P.M. and Murphy pulled up behind Ker's vehicle approximately twelve minutes later. [Tr. of R. p. 95.] Within 15 to 30 minutes thereafter, Warthen had identified the car through the Department of Motor Vehicles and conveyed Ker's name and address to Berman, together with an account of what he and Markman had just witnessed. [Tr. of R. pp. 24, 26, 29, 92.] Immediately after their conversation, Warthen, Berman and their fellow officers went to the apartment house, entering the apartment 15 or 20 minutes later. [Tr. of R. pp. 92-93.] It can hardly be doubted that the officers were in hot pursuit, for had Ker not made a U-turn in the middle of the street while heading north on La Brea [Tr. of R. p. 24] they would have been able to follow him home.

2. The Seizure Was Incident to a Lawful Arrest.

As previously mentioned, petitioners say that since a search preceded Ker's arrest the arrest must be regarded as a pretext for the search and the latter condemned as unreasonable. But did the discovery of the marijuana brick constitute a search? As the officers entered the apartment and identified themselves to Ker, Mrs. Ker walked simultaneously from the kitchen to the living room. Berman identified himself to her, took a few steps to the kitchen door and, *without entering the kitchen*, he saw the marijuana on the scale on top of the sink. [Tr. of R. pp. 31, 61.] The contraband was in plain sight and to see what is in plain sight does not constitute a search. *(United States v. Lee*, 274 U. S. 559, 563, 71 L. Ed. 1202, 47 S. Ct. 746; *United States v. Lefkowitz*, 285 U. S. 452, 465, 76 L. Ed. 877, 52 S. Ct. 420; *Cradle v. United States* (D. C. Cir.), 178 F. 2d 962, 963; *Ellison v. United States* (D. C. Cir.), 206 F. 2d 476, 478; *People v. Martin*, 45 Cal. 2d 755, 290 P. 2d 855; *People v. West*, 144 Cal. App. 2d 214, 300 P. 2d 729; *People v. Roberts*, 182 Cal. App. 2d 431, 6 Cal. Rptr. 161.)

If, however, which respondent denies, the marijuana was found during the course of a search, respondent nevertheless submits that the fact it was discovered before the officers told petitioners they were under arrest should not be held to invalidate the search. The officers had probable cause for arresting Ker before they entered the apartment and the validity of the arrest did not depend upon the discovery of the contraband. Having lost contact with his automobile, they were not guilty of rejecting a convenient opportunity to arrest him earlier. The arrest occurred within 1 to 1½ minutes

after the officers effected their entry. [Tr. of R. p. 96.] California has declined to adopt a fixed rule that a search may be justified as incidental to a lawful arrest only if the arrest precedes the search. (*People v. Simon, supra,* 45 Cal. 2d 645, 290 P. 2d 531.) The California Supreme Court said in *Simon* (45 Cal. 2d, at pp. 648-649, 290 P. 2d, at p. 533):

> ". . . Thus, if the officer is entitled to make an arrest on the basis of information available to him before he searches, and as an incident to that arrest is entitled to make a reasonable search of the person arrested and the place where he is arrested, there is nothing unreasonable in his conduct if he makes the search before instead of after the arrest. In fact, if the person searched is innocent and the search convinces the officer that his reasonable belief to the contrary is erroneous, it is to the advantage of the person searched not to be arrested. On the other hand, if he is not innocent or the search does not establish his innocence, the security of his person, house, papers, or effects suffers no more from a search preceding his arrest than it would from the same search following it. In either case the important considerations are whether the officer had reasonable cause before the search to make an arrest and whether the search and any seizures incident thereto were or were not more extensive than would reasonably be justified as incident to an arrest. (See United States v. Rabinowitz, 339 U. S. 56, 60-64 [70 S. Ct. 430, 94 L. Ed. 653].) We conclude, therefore, that a search is not unlawful merely because it precedes rather than follows the arrest."

In view of the foregoing, it cannot reasonably be contended that the California rule is incompatible with a "concept of ordered liberty" or that it gives less than adequate protection to the security of one's person and property against arbitrary conduct by the police. Respondent submits, therefore, that the rule ought not to be struck down and conduct of the police in reliance upon it ought not to be condemned.

D. The Arrest of Petitioner Diane Ker Was Lawful.

It is also said: "Prior to entry into the apartment, no suspicion whatever attached to Diane K. Ker, and we suggest that, in all events, the entire proceedings were unlawful as to her." (Brief of Amicus Curiae, p. 2.) No argument whatever is presented in support of this suggestion and respondent submits that it is without merit.

Mrs. Ker was in the kitchen when the officers entered the apartment. She left it when they identified themselves to her husband. The contraband was in plain sight on the sink, the package "had a small tear in it" and a knife was lying on the sink. [Tr. of R. pp. 31, 61.] Furthermore, there was a coffee pot on the drainboard near the sink and on the kitchen table a partially eaten slice of toast and a cup containing coffee. [Tr. of R. p. 82.] These circumstances were surely sufficient to warrant the officers in entertaining a reasonable belief that she was jointly in possession of the contraband and in placing her under arrest.

Conclusion.

In the 7½ years since California adopted the exclusionary rule her courts have developed detailed standards of police conduct and applied them to a host of cases. These standards are adequate to protect her citizens from lawless police action without unreasonably diminishing police effectiveness. California has condemned both the roust and the fishing expedition. Her laws should not be superseded in an illusory quest for an elusive uniformity. In the present case, the conduct of the police was upheld by the California courts, applying the standards defended in the course of this brief. Petitioners have no remedy from this Court unless they were deprived of due process of law under the Fourteenth Amendment. Respondent submits that petitioners have not been deprived of due process and accordingly requests that the judgment of the District Court of Appeal of the State of California be affirmed.

Respectfully submitted.

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APPENDIX A.

The following is a reasonably comprehensive list of the California cases, decided since *People v. Cahan*, 44 Cal. 2d 434, 282 P. 2d 905, governing all phases of the law of arrest, search and seizure. The list includes cases involving privileged communications from informants.

Aday v. Superior Court, 55 Cal. 2d 789
Arata v. Superior Court, 153 Cal. App. 2d 767
Badillo v. Superior Court, 46 Cal. 2d 269
Bielicki v. Superior Court, 57 A. C. 647
Britt v. Superior Court, 58 A. C. 480
Byars v. Superior Court, 57 A. C. 654
Castiel v. Superior Court, 162 Cal. App. 2d 710
Coy v. Superior Court, 51 Cal. 2d 471
De Losa v. Superior Court, 166 Cal. App. 2d 1
Gascon v. Superior Court, 169 Cal. App. 2d 356
Hatjis v. Superior Court, 144 Cal. App. 2d 426
Hernandez v. Superior Court, 143 Cal. App. 2d 20
Lorenzen v. Superior Court, 150 Cal. App. 2d 506
Mitchell v. Superior Court, 50 Cal. 2d 827
Montgomery v. Superior Court, 146 Cal. App. 2d 622
Ovalle v. Superior Court, 202 A. C. A. 834
People v. Accardy, 184 Cal. App. 2d 1
People v. Acosta, 142 Cal. App. 2d 59
People v. Adame, 169 Cal. App. 2d 587
People v. Aguilar, 191 Cal. App. 2d 887
People v. Aguirre, 158 Cal. App. 2d 304
People v. Alaniz, 149 Cal. App. 2d 560
People v. Alaniz, 185 Cal. App. 2d 344
People v. Albert, 182 Cal. App. 2d 729
People v. Albino, 184 Cal. App. 2d 84

People v. Alcala, 169 Cal. App. 2d 468
People v. Alcala, 204 A. C. A. 14
People v. Alcria, 193 Cal. App. 2d 352
People v. Alesi, 169 Cal. App. 2d 758
People v. Alexander, 168 Cal. App. 2d 753
People v. Allen, 142 Cal. App. 2d 267
People v. Allen, 196 Cal. App. 2d 655
People v. Almarez, 190 Cal. App. 2d 380
People v. Alvarez, 154 Cal. App. 2d 694
People v. Alvidrez, 158 Cal. App. 2d 299
People v. Amado, 167 Cal. App. 2d 345
People v. Ambrose, 155 Cal. App. 2d 513
People v. Ambrose, 199 A. C. A. 885
People v. Ames, 151 Cal. App. 2d 714
People v. Amos, 181 Cal. App. 2d 506
People v. Amos, 190 Cal. App. 2d 384
People v. Anders, 167 Cal. App. 2d 65
People v. Anderson, 145 Cal. App. 2d 201
People v. Anderson, 199 A. C. A. 541
People v. Andrews, 153 Cal. App. 2d 333
People v. Anguiano, 198 Cal. App. 2d 426
People v. Anushevitz, 183 Cal. App. 2d 752
People v. Arketa, 207 A. C. A. 199
People v. Armenta, 197 Cal. App. 2d 707
People v. Arter, 169 Cal. App. 2d 439
People v. Ashcraft, 138 Cal. App. 2d 820
People v. Augustine, 152 Cal. App. 2d 264
People v. Avas, 144 Cal. App. 2d 91
People v. Baca, 184 Cal. App. 2d 693
People v. Baca, 198 Cal. App. 2d 391
People v. Baker, 135 Cal. App. 2d 1
People v. Baker, 170 Cal. App. 2d 240
People v. Ball, 162 Cal. App. 2d 465

People v. Baltazar, 159 Cal. App. 2d 595
People v. Baranko, 201 A. C. A. 234
People v. Barnett, 156 Cal. App. 2d 803
People v. Barnett, 159 Cal. App. 2d 22
People v. Barquera, 207 A. C. A. 765
People v. Bates, 163 Cal. App. 2d 847
People v. Beard, 46 Cal. 2d 278
People v. Beard, 199 A. C. A. 66
People v. Benjamin, 154 Cal. App. 2d 164
People v. Benson, 206 A. C. A. 608
People v. Berger, 44 Cal. 2d 459
People v. Bernal, 174 Cal. App. 2d 777
People v. Beverly, 200 A. C. A. 117
People v. Blankenship, 171 Cal. App. 2d 66
People v. Blanton, 195 Cal. App. 2d 278
People v. Di Blasi, 198 Cal. App. 2d 215
People v. Blodgett, 46 Cal. 2d 114
People v. Bly, 191 Cal. App. 2d 352
People v. Bock Leung Chew, 142 Cal. App. 2d 400
People v. Bookout, 197 Cal. App. 2d 457
People v. Borbon, 146 Cal. App. 2d 315
People v. Bouchard, 161 Cal. App. 2d 302
People v. Boyce, 183 Cal. App. 2d 763
People v. Boyd, 162 Cal. App. 2d 332
People v. Boyd, 173 Cal. App. 2d 537
People v. Boyles, 45 Cal. 2d 652
People v. Bracamonte, 194 Cal. App. 2d 167
People v. Bradley, 152 Cal. App. 2d 527
People v. Brajevich, 174 Cal. App. 2d 438
People v. Brinson, 191 Cal. App. 2d 253
People v. Brittain, 149 Cal. App. 2d 201
People v. Brown, 45 Cal. 2d 640
People v. Brown, 147 Cal. App. 2d 352

People v. Brown, 184 Cal. App. 2d 588
People v. Brown, 191 Cal. App. 2d 72
People v. Brown, 204 A. C. A. 498
People v. Brown, 205 A. C. A. 225
People v. Burgess, 170 Cal. App. 2d 36
People v. Burke, 47 Cal. 2d 45
People v. Burke, 208 A. C. A. 166
People v. Cahan, 141 Cal. App. 2d 891
People v. Cahan, 150 Cal. App. 2d 786
People v. Cahill, 163 Cal. App. 2d 15
People v. Calderon, 205 A. C. A. 630
People v. Campos, 184 Cal. App. 2d 489
People v. Cancimilla, 197 Cal. App. 2d 242
People v. Cannon, 148 Cal. App. 2d 163
People v. Cantley, 163 Cal. App. 2d 762
People v. Carella, 191 Cal. App. 2d 115
People v. Carey, 171 Cal. App. 2d 531
People v. Caritativo, 46 Cal. 2d 68
People v. Carnes, 173 Cal. App. 2d 559
People v. Carswell, 51 Cal. 2d 602
People v. Carswell, 149 Cal. App. 2d 395
People v. Carter, 48 Cal. 2d 737
People v. Carter, 192 Cal. App. 2d 648
People v. Cartier, 170 Cal. App. 2d 613
People v. Castiel, 153 Cal. App. 2d 653
People v. Cervantes, 177 Cal. App. 2d 187
People v. Chapman, 207 A. C. A. 580
People v. Chatman, 166 Cal. App. 2d 627
People v. Chavez, 208 A. C. A. 263
People v. Cherrie, 162 Cal. App. 2d 143
People v. Childs, 201 A. C. A. 672
People v. Chong Wing Louie, 149 Cal. App. 2d 167
People v. Cisneros, 166 Cal. App. 2d 100

People v. Clifton, 169 Cal. App. 2d 617
People v. Coleman, 134 Cal. App. 2d 594
People v. Collier, 169 Cal. App. 2d 19
People v. Collins, 186 Cal. App. 2d 329
People v. Colonna, 140 Cal. App. 2d 705
People v. Combes, 56 Cal. 2d 135
People v. Contreras, 154 Cal. App. 2d 321
People v. Corrao, 201 A. C. A. 940
People v. Covan, 178 Cal. App. 2d 416
People v. Cox, 156 Cal. App. 2d 472
People v. Crayton, 174 Cal. App. 2d 267
People v. Criswell, 192 Cal. App. 2d 470
People v. Crowley, 193 Cal. App. 2d 310
People v. Cuda, 178 Cal. App. 2d 397
People v. Cunningham, 188 Cal. App. 2d 606
People v. Daily, 157 Cal. App. 2d 649
People v. Daley, 172 Cal. App. 2d 311
People v. Davis, 178 Cal. App. 2d 887
People v. Davis, 188 Cal. App. 2d 718
People v. Davis, 205 A. C. A. 581
People v. Dean, 151 Cal. App. 2d 165
People v. Demery, 187 Cal. App. 2d 613
People v. Denne, 141 Cal. App. 2d 499
People v. Derby, 177 Cal. App. 2d 626
People v. Dewson, 150 Cal. App. 2d 119
People v. Diaz, 174 Cal. App. 2d 799
People v. Diggs, 161 Cal. App. 2d 167
People v. Dillard, 168 Cal. App. 2d 158
People v. Dixon, 46 Cal. 2d 456
People v. Dominguez, 144 Cal. App. 2d 63
People v. Dominguez, 191 Cal. App. 2d 704
People v. Dore, 146 Cal. App. 2d 541
People v. Dosier, 180 Cal. App. 2d 436

People v. Duncan, 51 Cal. 2d 523
People v. Dupee, 151 Cal. App. 2d 364
People v. Durazo, 52 Cal. 2d 354
People v. Duroncelay, 48 Cal. 2d 766
People v. Easley, 148 Cal. App. 2d 565
People v. Edwards, 142 Cal. App. 2d 419
People v. Elliott, 186 Cal. App. 2d 178
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People v. Ellsworth, 190 Cal. App. 2d 844
People v. Escobosa, 179 Cal. App. 2d 751
People v. Escoto, 185 Cal. App. 2d 599
People v. Evans, 175 Cal. App. 2d 274
People v. Ewine, 198 Cal. App. 2d 364
People v. Eychas, 182 Cal. App. 2d 360
People v. Fabela, 175 Cal. App. 2d 543
People v. Farrara, 46 Cal. 2d 265
People v. Faulkner, 166 Cal. App. 2d 446
People v. Feeley, 179 Cal. App. 2d 100
People v. Felli, 156 Cal. App. 2d 123
People v. Ferrera, 149 Cal. App. 2d 850
People v. Fields, 167 Cal. App. 2d 773
People v. Fischer, 49 Cal. 2d 442
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People v. Fisher, 184 Cal. App. 2d 308
People v. Fitch, 189 Cal. App. 2d 398
People v. Follins, 173 Cal. App. 2d 783
People v. Foster, 199 A. C. A. 905
People v. Frangadakis, 184 Cal. App. 2d 540
People v. Galceran, 178 Cal. App. 2d 312
People v. Gallagher, 177 Cal. App. 2d 427
People v. Gale, 46 Cal. 2d 253
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People v. Gambos, 181 Cal. App. 2d 556

People v. Garcia, 171 Cal. App. 2d 757
People v. Garcia, 187 Cal. App. 2d 93
People v. Gardner, 177 Cal. App. 2d 43
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People v. Garrison, 189 Cal. App. 2d 549
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People v. Goldberg, 152 Cal. App. 2d 562
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People v. Gonzales, 136 Cal. App. 2d 437
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People v. Gonzales, 186 Cal. App. 2d 79
People v. Gonzales, 186 Cal. App. 2d 370
People v. Gonzales, 193 Cal. App. 2d 434
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People v. Gorg, 45 Cal. 2d 776
People v. Gorg, 157 Cal. App. 2d 515
People v. Gould, 170 Cal. App. 2d 489
People v. Graff, 144 Cal. App. 2d 199
People v. Green, 152 Cal. App. 2d 886
People v. Green, 183 Cal. App. 2d 736
People v. Griffin, 162 Cal. App. 2d 712
People v. Guerrera, 149 Cal. App. 2d 133
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ple v. Hollins, 173 Cal. App. 2d 88
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ople v. Houston, 164 Cal. App. 2d 396
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ople v. Hurst, 183 Cal. App. 2d 379
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People v. Jackson, 202 A. C. A. 627
People v. Jacobs, 196 Cal. App. 2d 587
People v. Jager, 145 Cal. App. 2d 792
People v. Jaquish, 170 Cal. App. 2d 376
People v. Jaurequi, 142 Cal. App. 2d 555
People v. Jennings, 142 Cal. App. 2d 160
People v. Jiminez, 143 Cal. App. 2d 671
People v. Johnson, 139 Cal. App. 2d 663
People v. Johnson, 153 Cal. App. 2d 870
People v. Johnson, 155 Cal. App. 2d 369
People v. Johnson, 157 Cal. App. 2d 555
People v. Johnson, 195 Cal. App. 2d 573
People v. Justice, 167 Cal. App. 2d 616
People v. Keener, 55 Cal. 2d 714
People v. Kelly, 195 Cal. App. 2d 669
People v. Kelsey, 140 Cal. App. 2d 722
People v. Ker, 195 Cal. App. 2d 246
People v. King, 140 Cal. App. 2d 1
People v. King, 175 Cal. App. 2d 386
People v. Kitchens, 46 Cal. 2d 260
People v. Lane, 56 Cal. 2d 773
People v. Langley, 182 Cal. App. 2d 89
People v. Lawrence, [illegible] Cal. App. 2d 435
People v. Lawton, 150 Cal. App. 2d 431
People v. Lawton, 186 Cal. App. 2d 834
People v. Lepur, 175 Cal. App. 2d 798
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People v. Lovio, 189 Cal. App. 2d 427
People v. Lucas, 180 Cal. App. 2d 723
People v. Luckman, 198 Cal. App. 2d 347
People v. Lugo, 203 A. C. A. 859
People v. Lujan, 141 Cal. App. 2d 143
People v. Luna, 155 Cal. App. 2d 493
People v. Lundy, 151 Cal. App. 2d 244
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People v. Macias, 180 Cal. App. 2d 193
People v. Maddox, 46 Cal. 2d 301
People v. Malone, 173 Cal. App. 2d 234
People v. Malotte, 46 Cal. 2d 59
People v. Mann, 148 Cal. App. 2d 851
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People v. Marion, 197 Cal. App. 2d 835
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People v. McCarty, 164 Cal. App. 2d 322
People v. McCottrey, 205 A. C. A. 772
People v. McCoy, 195 Cal. App. 2d 655
People v. McFarland, 201 A. C. A. 9
People v. McFarran, 155 Cal. App. 2d 383
People v. McGhee, 196 Cal. App. 2d 625

People v. Mackenzie, 144 Cal. App. 2d 100
People v. McLaine, 204 A. C. A. 119
People v. McLean, 56 Cal. 2d 660
People v. McMurray, 171 Cal. App. 2d 178
People v. McShann, 50 Cal. 2d 802
People v. McShann, 177 Cal. App. 2d 195
People v. Megliorino, 192 Cal. App. 2d 525
People v. Melody, 164 Cal. App. 2d 728
People v. Mendoza, 145 Cal. App. 2d 279
People v. Merino, 151 Cal. App. 2d 594
People v. Michael, 45 Cal. 2d 751
People v. Miller, 143 Cal. App. 2d 558
People v. Miller, 193 Cal. App. 2d 838
People v. Mills, 148 Cal. App. 2d 392
People v. Misquez, 152 Cal. App. 2d 471
People v. Molarius, 146 Cal. App. 2d 129
People v. Montano, 184 Cal. App. 2d 199
People v. Montes, 146 Cal. App. 2d 530
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People v. Moore, 140 Cal. App. 2d 870
People v. Moore, 141 Cal. App. 2d 87
People v. Moore, 154 Cal. App. 2d 43
People v. Moore, 205 A. C. A. 807
People v. Morgan, 146 Cal. App. 2d 722
People v. Morgan, 197 Cal. App. 2d 90
People v. Morris, 157 Cal. App. 2d 81
People v. Mullane, 182 Cal. App. 2d 765
People v. Mulvey, 196 Cal. App. 2d 714
People v. Muniz, 172 Cal. App. 2d 688
People v. Murphy, 173 Cal. App. 2d 367
People v. Murray, 198 Cal. App. 2d 805
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People v. Nelson, 171 Cal. App. 2d 356
People v. Newberry, 204 A. C. A. 3
People v. Nichols, 196 Cal. App. 2d 223
People v. Northrup, 203 A. C. A. 498
People v. Odegard, 203 A. C. A. 450
People v. Okamoto, 177 Cal. App. 2d 407
People v. One 1958 Chevrolet, 179 Cal. App. 2d 604
People v. One 1955 Ford Victoria, 193 Cal. App. 2d 213
People v. One 1949 Plymouth Sedan, 148 Cal. App. 2d 220
People v. One 1956 Porsche Convertible, 175 Cal. App. 2d 251
People v. Olson, 166 Cal. App. 2d 532
People v. O'Neill, 187 Cal. App. 2d 732
People v. Ortiz, 147 Cal. App. 2d 248
People v. Pack, 199 A. C. A. 897
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